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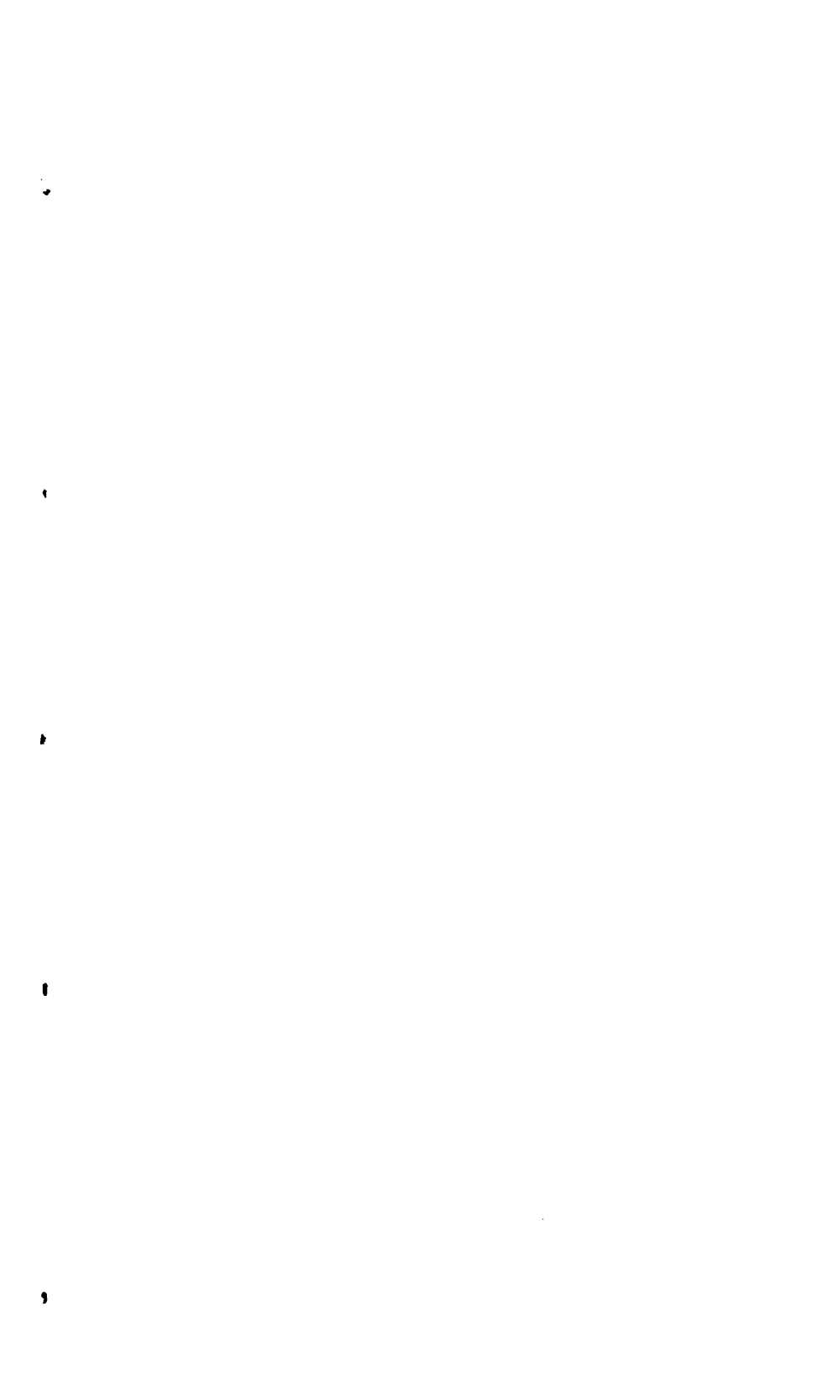
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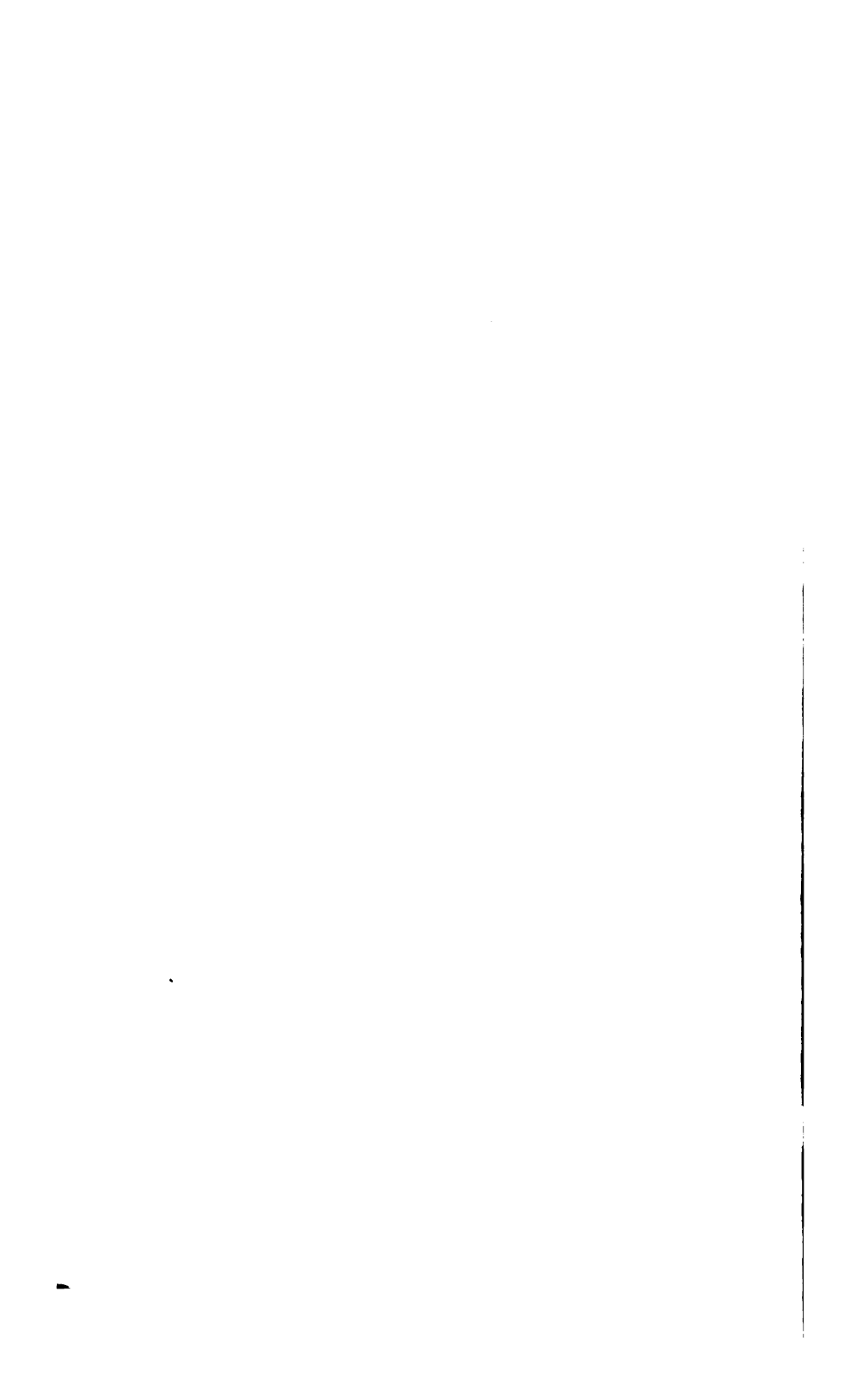




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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of Appeals

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STATE REPORTER.

VOL. IV.

Containing *Law Opinions* in 1826, 1827 and 1828.

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JUDGES,

DURING THE PERIOD COMPRISED IN THIS VOLUME.



Of the Court of Appeals.

HON. ABRAHAM NOTT, *Presiding Judge.*
HON. C. J. COLCOCK.
HON. DAVID JOHNSON.

Of the Circuit Court.

HON. E. H. BAY.*
HON. THEODORE GAILLARD.
HON. RICHARD GANTT.
HON. DANIEL E. HUGER.
HON. WILLIAM D. JAMES.
HON. JOHN S. RICHARDSON.
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PHILIP E. PEARESON, Esq. (*Middle Circuit.*)
FRANKLIN H. ELMORE, Esq. (*Northeastern Circuit.*)

**Exempt from duty on account of age.*

~~65~~ The Reporter forgot in the case of *Hall vs. Goodwyn*, 442, to add a reference to *Crawford vs. Dunlap*, 2 *M'Cord's Chancery Reports*, 171, which contains Judge *Norr's* reasons for dissenting from the principle laid down by the Court in the former case.

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LAW CASES
ARGUED AND DETERMINED IN
THE COURT OF APPEALS,
OF
SOUTH CAROLINA,
IN
FEBRUARY TERM, CHARLESTON, 1826.

JUDGES PRESENT.

HON. ABRAHAM NOTT, *Presiding Judge.*
HON. C. J. COLCOCK,
HON. DAVID JOHNSON.

WM. BUDD, survivor of Schult & Budd, vs. UNION INSURANCE COMPANY. JOHN ROSE vs. the same.

The insured cannot abandon for a total loss, unless the loss from the sea damage exceed one half of the goods insured, or the gross amount paid for them.

Where the jury give a verdict for a partial loss, it does not follow that they must give interest on the amount of loss, and the verdict will not be disturbed where the defendants had offered to pay the partial loss.

THESE were two separate actions on two policies of Insurance on certain goods, viz: 174 whole and 29 half casks of rice shipped on board the sloop Hope, Captain

Johnston, tried before Mr. Justice Richardson, at Charleston. The policy of Schult & Budd was dated 21st September, 1821, from Charleston to New Orleans, with liberty to touch at Pensacola, on \$1,550. The policy of John Rose was dated 23rd September 1821, for the same voyage, on \$2,000. The sloop Hope sailed from Charleston on her destined voyage. At the time of her departure she was sound, staunch, and in every respect, seaworthy; but on the 24th October 1821, she met with severe gales which compelled a deviation. She made for the Balize at the mouth of the Mississippi River; heavy gales still continuing, and on her arrival at the Balize, she struck on an old wreck; on getting her off the wreck and bank, it was discovered that the leak had gained so fast as to render it necessary for the pilot to run her as near the mud bank at the Balize as possible, to prevent her going down. The cargo was all landed at the Balize. The ground floor consisted of 54 casks which the Captain thought were all more or less damaged. On the 30th Oct. the Captain departed from the Balize for New Orleans with a part of the cargo in lighters, where he arrived on the 3rd Nov. and landed the same on the 5th and 6th of November. On the 11th November, he again sailed from the Balize for New Orleans with another portion, and on the 20th November, the residue of the Hope's cargo arrived at New-Orleans. The regular protests were noted and extended. On the arrival of the cargo at New Orleans, a survey by the Port Wardens was called, and the surveyors returned that 28 casks were more or less damaged. As to the number of casks found to be damaged, there was a variance; one witness testifying that as many as 46 were actually damaged, and, perhaps, more. The cargo was abandoned to the underwriters, as a total loss, and the same was sold by order of the consignees at public auction. The amount of

nett sales was \$2,367,10. Of this amount Schult & Budd were entitled to receive \$864,90, after paying other expenses, exclusive of salvage, and John Rose was entitled to receive \$1,079,08, after paying the expenses, exclusive of salvage; and the amount of salvage allowed was 44 per cent on the whole amount.

The plaintiff contended at the trial for the right to abandon, and claimed for a total loss. The defendants objected that there was not a total loss, and that the plaintiffs were entitled only to receive compensation for the 28 casks, said by the Port Wardens to be injured.

RICHARDSON, J. charged the jury that in his opinion there was a total loss, and that if they gave the plaintiffs the 28 casks or more as the amount damaged, they were at liberty to find a verdict for the true loss with or without interest at their sound discretion.

The jury found a verdict for 46 casks injured, but allowed no interest, giving to Schult & Budd \$612,78 and to John Rose \$801,28. From these verdicts, the plaintiffs appealed, and *Cogdell* and *Gilchrist* made the following points—

- 1st. That the verdicts of the jury were erroneous, in as much as a partial loss was found and no interest thereon allowed.

- 2nd. That the presiding Judge was wrong in charging the jury that a partial loss only was proved, when in fact the evidence established a total loss.

Toomer, for the defendants.

CURIA, *per* COLCOCK, J.—Two questions are presented in this case: 1st. Whether the insured had a right to abandon as for a total loss? and 2ndly, Whether the plaintiffs were entitled as a matter of right to interest on the amount found by the jury for a partial loss? It is now, with us, the well settled doctrine that the insured cannot abandon as for a total loss, unless the loss exceed the

one half of the goods insured, or the gross amount paid for them, and *that* from the sea damage which they sustain. Marshall on Insurance. Gardiner v. Smith, 1 Johnson's Cases 141. Ludlow and Col. Ins'ce. Co., 1 Johnson's Rep. 335. Vandenheuevel v. Un. Ins'ce. Co. ib. 435. 2 East 581. 3 Johnson's Cases 217.. The ordinance of the Marine of Lewis 14th which in this, as in most other particulars, is collected from the same ancient sources from whence other countries have drawn their principles of the Law of Insurance, confines abandonment to these five cases, i. e. *Capture, Shipwreck, Stranding, Arrest of Princes, or the entire loss of the things Insured.* 2. Marshall 562. Here stranding, if the vessel be not destroyed, (and so perhaps it may in the French law,) is not a ground for abandonment. And it has been allowed on all hands that the doctrine has been carried already too far. How it came to be introduced is not satisfactorily accounted for; it is certainly a right never exercised but with most manifest injustice to the insurers, and it is the most unfair and unequal principle ever introduced into contracts.

On the second question, there is some difficulty arising from the different opinions which have been expressed on the subject. But it appears from the English authorities to be well settled, that in no cases of unliquidated damages is interest recoverable; and although we have in some cases allowed interest to be given under the name of damages, we have never gone so far as to say that in cases of Insurance it was recoverable as a matter of right. Some *obiter dicta* may be found in our cases perhaps to that effect, but no decision directly on the point. To call the offer to pay the amount of the loss sustained a tender, is certainly not speaking technically. But the cases referred to, (Peake Nisi Prius Cases, 88, and 1 Campbell, 184,) are to be understood and may be reconciled

by this view of the subject. When the jury are required by the assured to give interest by way of damages, it is certainly admissible for the insurer to reply that interest should not be allowed by way of damages, because an offer to pay what was actually due was made and refused; and such offer is considered analogous to a tender. One, certainly, claims with a bad grace from a jury that which he himself has refused to accept. It may be well said to him, if you had been content to take that which was justly due to you, the expenses and trouble of this suit might have been avoided; and such a consideration, I think, not without weight in assessing damages. We cannot then disturb the verdict on this ground. The motion must be dismissed.

Motion dismissed.

THE STATE VS. THE COMMISSIONERS OF THE ROADS OF
ST. HELENA.

The Commissioners of the Roads have the power to alter or change a road, belonging to their jurisdiction, for a short distance, particularly when the alteration is at the request of the individual over whose land the road runs, and where it is productive of no great inconvenience.

This matter came before the Court, at Coosawhatchie, in April 1824, (Mr. Justice *Colcock* sitting,) on a rule upon the Commissioners taken out at the November term preceding, to shew cause why a mandamus should not issue, commanding them to restore a certain road near Beaufort and keep the same in repair. It appeared that the road leading from Beaufort to Battery Point had been a public road before 1796, and that the commissioners in 1822, had sanctioned an alteration in the road to relieve a Mr. Scriven over whose land it ran. This complaint was made by Mr. Smith, complaining of the alteration, on the

ground that it was an inconvenience to him in going to his plantation. His honor dismissed the application, on the ground that the Commissioners had the power at their discretion to turn and alter the road, however long established and that notice to the owner of the land, Mr. Screven, over which the old road ran, should have been given of this application. The Commissioners thought the new road a great inconvenience to Mr. Screven and of little importance to Mr. Smith. The new road had been made at the expense of Mr. Screven.

This appeal was now taken up, on the ground that the Commissioners had no authority to change or alter any old established road or private path, unless such alteration be absolutely necessary, and that it was not requisite to have given notice to Screven. (See act of 1811.)

Elmore, Sol. for the motion.

CURIA, *per* COLCOCK, J.—By the act of 1788, something like a regular system was attempted to be established in relation to the roads of the state, and the Commissioners are authorised and required to lay out, make and keep in repair, all such high roads, private paths, &c. as shall have been, or shall be established by law, or as they shall judge necessary in their several parishes; and in order to effect these objects very extensive powers and authority are given to them; all of which are recognized and many of them even extended by various subsequent acts; as the act of 18— which authorizes them to stop up such roads as they shall deem useless. (a) Under these general powers, there can be no doubt, that they have the authority on sufficient grounds to change the direction of a road for a short distance, particularly when the alteration is at the request of the individual through whose land the road runs, and where it is productive of no great inconveni-

(a) The Reporter has examined the acts, but cannot find that to which his honor alludes.

ence; and this power is daily exercised by them, even with regard to the high roads. Suppose a road should become impassable and it should be difficult and expensive to repair it, can it be conceived, that the Commissioners could not with the consent of the owner of the soil, turn the road through a higher or more eligible spot; or if in establishing a neighbourhood road, they should at first run it through the only spot which was fit for a settlement, would it be proper to compel the owner to abandon this site and build in an inconvenient part of his land, rather than give the road a direction to the right or left. There are few of the public functionaries of this country vested with such extensive authority as the Commissioners of Roads, and it is, therefore, their duty, at all times, to exercise their powers with a due regard to the rights of individuals. The road in question is a neighbourhood road not often used by more than two or three persons. It did pass directly through the yard of Mr. Screven, and thereby subjected him to great inconvenience; it is now turned a short distance around his fence, and according to the report of the last committee appointed by the Board of Commissioners, is in good repair and has been made so by the owner of the land; and now, by the work of those who are liable to work on it, can be kept in repair. The evidence sufficiently established the jurisdiction of the Commissioners; for although the first entry, of 1747, which is referred to, cannot now be found in the books of the Commissioners, it has long been considered as a public road and worked on as such, and is such a road as the Commissioners have authority over.

Motion dismissed.

JOHN HARTH vs. R. R. GIBBES.

The assignees of an insolvent debtor taking the benefit of the insolvent debtors act, may be compelled on rule to account before the Court of Common Pleas; and if the accounts are complicated, it may be referred to the Clerk to report on them.

Liens existing before the assignment still have preference as to the proceeds of the property assigned, and are payable in their order. But an execution does not bind money, and the cash and proceeds of choses in action assigned, are payable rateably among all the creditors, the expenses of the assignment and commissions first deducted. (a)

This was a rule on Young and two other assignees, appointed by the Court, of the estate of R. R. Gibbes, to shew cause why they should not pay over certain monies in their hands to the holders of the oldest judgment against R. R. Gibbes. The assignees objected to the rule, that they could not be called on to account in this way, which objection the presiding judge (*Bay J.*) overruled, and ordered that the assignees should return what funds they had in hand. They afterwards produced their accounts shewing that they had received \$1,284 06, and disbursed \$140 22; that the amount of \$1204 06 which they had received, consisted of \$190 06 received for the sale of part of the property assigned; \$594 of money which Gibbes had in hand and paid into court when he took the benefit of the act; and of \$500 which had been paid to them on a bond, one of the choses in action assigned.

The presiding judge ordered the assignees to pay over to the oldest judgment, the proceeds of the property sold, and the money they received at Gibbes' hands. From this order the assignees appealed and shewed for cause—

That the Court has not jurisdiction of trusts, and that it could not call the trustees of an insolvent debtor to account by rule. That the sums disbursed should have been charged against the assets received, or against the

(a) See *Mairs vs. Smith*, 3 M'Cord 52.

proceeds of the property sold, and that the residue only of the proceeds of the property was applicable to the oldest judgment; and that the judgment or execution creditors had no lien on the money paid into Court by Gibbes when he took the benefit of the act.

Grimke contra. The power of entering up a judgment on an award goes on the principal and incident. So of all proceedings against the Sheriff and other officers of the Court. The assignees are the agents of the Court, and as such are liable to be called on to account. *M'Willie vs. Hudson*, 2 Const. Rep. Tread. 119.

When a power is given by statute every thing necessary to give it effect is implied. *Warring vs. Catawba Co.* 2 Bay 109. 6 Bac. tit. Statute B. 369.

CURIA per COLCOCK J.—In this case the Court concur in the opinion delivered by the presiding judge, that the assignees are answerable to the Court of Common Pleas for their conduct, and consequently subject to be called before the Court by rule, to shew in what manner they are proceeding. This responsibility seems to result as a matter of course from the appointment by that Court. They are the officers of the Court *pro hac vice*. The act throughout seems to justify this construction, for their compensation is to be fixed by the Court; and this would seem to imply that there must be a knowledge of the services performed. It is in analogy with the accountability of all other officers, as the Commissioners of Bankrupts to the Chancellor, arbitrators to the Court which appoints them, and Sheriffs and Clerks to their respective Courts. It is also certainly more convenient and less expensive than by application to the Court of Equity, which would often swallow up a large portion of the fund. It is apparent that cases may occur in which the examination of the accounts of the assignees would be attended with a great deal of trouble; but in such ca-

ses a reference may be made to the Clerk, and he required to report to the Court.

Having decided then that the assignees are accountable to this Court, the next question is, how shall the funds in their hands be distributed ; and this is a question of much greater difficulty. By the first clause of the act, the applicant is directed to assign to the creditor or creditors at whose suit such petitioner stands charged, or to such other person or persons as the said Court shall direct, and that the assignment so made as aforesaid " shall be in trust for the suitor or suitors and such other the creditors of the said petitioners as shall be willing to receive a dividend of his real estate, goods and effects, and shall within twelve months after the time of exhibiting the petition make their demands : and by such assignment the estate, interest and property of the lands, goods and effects, so assigned, shall be vested in the persons to whom such assignment is made, who may take possession of or sue for the same, in his or their own name or names, in like manner as assignees in commissions of bankruptcy can or lawfully may do by the laws or statutes of Great Britain : And by the third section, it is enacted that the person or persons to whom the said assignments are made, shall be and are hereby declared to be trustees for all and singular the creditors of the said petitioner, who are willing to come in and receive their dividends, and who shall within twelve months after his discharge deliver unto the said trustees or any of them, an exact account upon oath of the several debts and demands to them owing, and that said trustee or trustees, after having sold the said petitioner's lands and effects, and collected in the several debts due to him, which they are hereby required to do with the utmost expedition, shall thereout, *first* satisfy and discharge the said costs of suit and other costs and fees aforesaid, and shall next deduct and retain in his or their own

hands a reasonable compensation for his or their trouble in executing the said trust, to be fixed and allowed by the Court by whom such person or persons were appointed trustee or trustees: and such trustee or trustees shall within one month thereafter divide the remaining balance of the said Estate among such of the creditors who deliver in the amount of their demands within the time aforesaid, according and in proportion to their several and respective debts."

By these provisions of the act it would appear as if the Legislature had intended, that the whole of a debtor's property should be divided rateably and in proportion among all his creditors. But it has been repeatedly decided that where there is a lien on part of the insolvent's property, that must be discharged in the first place; and it is contended that the money (\$500) paid by the defendant, Gibbes, into Court, at the time he took the benefit of the act, was bound by the executions, and consequently ought to be paid to them in their respective order of seniority. I have examined the authorities with attention, and they are very strong to support the position that money may be levied on by an execution, and even that bank bills have been considered as money for the purpose in the state of New-York. But if it is to follow (as it would seem unavoidably to do,) this doctrine, that money or bills must be considered as bound by the execution, the consequences which would result in practice are such as must necessarily induce us to dissent from the doctrine, for it would lead to endless litigation and perjuries. The property was certainly bound by the executions; the proceeds thereof must, therefore be paid to the oldest execution creditor, and then the expenses and commissions deducted from the sum in their hands, and the balance divided amongst such of the creditors as delivered in the amount of their demands within twelve months after the

discharge of the petitioner, in proportion to their several and respective debts; and that the sum of five per cent. be allowed the assignees for their trouble. The motion to reverse that part of the decision which makes the assignees answerable to the Court of Common Pleas, is dismissed; and so much thereof as orders the \$500 to be paid to the oldest judgment creditor is reversed.

Motion refused.

TABITHA SINGLETON VS. ADMX. OF FRANCIS BREMAR.

A fee cannot be limited to take effect in futuro; therefore a deed of a tract of land "in case of my death to A," is void as a conveyance.

X An instrument having the formality of a Deed, may operate as a Will, being voluntary and to take effect at the death of the maker.

A Covenant to stand seized to uses must be supported by a good or valuable consideration, and the insertion of the words "having received full value," or "for divers good causes and considerations," will not support such a covenant.

On complaint of a breach of covenant, the recovery must be measured by the consideration paid.

⎵ This case had been tried before, and was sent down for a new trial. (See Harper's Law Reports 201, for a report of the case.) It will not be necessary to repeat the evidence. The action was brought on two notes of hand for \$2,000 each. Defence—that there was no consideration. The Plaintiff being formerly Bremar's slave, had been freed and kept by him as his mistress, during his marriage with the defendant, until his death, and that these notes had been given in consideration of this intercourse. It was proved that Bremar supported her in Charleston, in lodgings hired by him, where he lodged whilst in Charleston, his residence being in St. Matthews Parish, and that she had no other property than what he gave her, and that he kept her till his death.

In reply the Plaintiff offered in evidence a paper to show that Bremar had conveyed to her a House and Lot in Charleston of considerable value, and had afterwards sold it and received the purchase money. The paper was in the following words: "I do hereby *in case of my death*, give to Tabitha Singleton, (a free brown woman,) my house and lot in Wentworth street, and to the said Tabitha Singleton her heirs and assigns forever, *having received full value*, and I do hereby warrant and defend the same from me and my heirs and all and every person or persons whatsoever. Given under my hand and seal this eighteenth day of May 1809. Sealed, delivered, &c." witnessed by two witnesses. This evidence was objected to, on the ground that the paper was void, being a conveyance of a freehold to commence in futuro. His honor, Mr. Justice *Gaillard* who tried the cause overruled the objection and admitted the deed, and charged the jury that if they believed that the notes were given in consideration of cohabitation, they were voluntary and the plaintiff's suit could not be maintained; but that it appeared to him that the evidence was too slight to establish that point, or in any wise to effect the note. That the deed of Bremar to the plaintiff gave her a title to the house and lot upon the death of Bremar, a life estate being reserved to himself.

The defendant appealed on the ground that the pretended conveyance of the house and lot was void, being the conveyance of a freehold to commence in futuro.

Petigru, Attorney General, and *Harper*, for appellant. The deed is void as a conveyance. It is not a covenant which will give an equitable interest. Equity could not execute such a deed. In favor of blood equity will execute covenants to stand seized—but here the consideration is immoral, *Coleman vs. Sorrell*, 3 Bro. C. C. 12. 1 Ves. Jr. 54. 1 Ves. 514.

Hunt, contra.—The notes express to be for value received, which is sufficient. The defendant was bound to prove that there was no consideration. The general presumption was in favour of the notes, and Bremar having sold her house and lot was conclusive. 7 John. Rep. 321. 8 John. 465. 9 John. 217. 5 Wheaton 277: He did not pretend that the paper promising to convey the house was a legal conveyance of title. But it was a covenant to stand seized to the use of himself for life, remainder to the plaintiff. The statute executes the use in presenti, 3 Com. Dig. 253. tit. Covenant. Preston on Estates, 217.

It expressed to be for value received. All that was necessary in such covenants is that the grantor be seized at the time, 2 Wils. 75. The Court looks to the intention of the covenantor. Co. Lit. 154b. Coltman vs. Senhouse, 2 Lev. 225.

CURIA, *per* JOHNSON, J.—It is objected that the presiding Judge misdirected the jury in charging them that this instrument gave the plaintiff a fair claim on the estate of the intestate for as much as her interest in the house was worth, at the time it was sold. The natural import of the terms used in the first part of this paper, would unquestionably give it the effect and operation of a will. By the term *give*, a voluntary donation is strongly implied, and the provision that is to take effect after his death superadds all the properties of a will. If it is to receive this interpretation, then the sale of the house by F. Bremar in his life time was an ademption of the legacy and the plaintiff took no interest under it. It is impossible, I think, by any rule of interpretation so to construe this paper as to vest any interest in possession in the plaintiff; the paper itself does not profess to convey any; on the contrary, it is limited to take effect at the death of the intestate; and it is one of the settled rules of the Common Law that a fee cannot be created to take effect in futuro.

2 Blackstone Comm. 165. 2 Woodd. 177; and, such a deed would therefore, be void. It is urged, however, that this rule is abrogated in this country by the substitution of the delivery of the deed instead of the Common Law mode of passing it by livery of seisen. But I apprehend that the delivery of the deed could not operate to vest a fee eo instanti in opposition to its express provision. The fee can never be in abeyance; and the principle on which the rule is founded, I take to be this, that the power of disposing of the fee is inseparable from the person in whom it is vested, and so long as it abides there the power remains. It follows, therefore, that the plaintiff had no interest in possession in the house and lot at the time of the sale. It has been further insisted that although it may not operate to vest an interest in possession, it is good as a covenant to stand seized to the use of the plaintiff; but to support such a covenant there must be either a good or valuable consideration. A general consideration, it is true, is expressed on this paper by the terms "having received full value;" but it must be recollected that the object of introducing it in evidence is in effect to recover for a breach of the covenant, and, as the recovery in an action founded on such a covenant must be measured by the consideration paid, it is impossible to judge of it from this general expression, and hence the rule that a general consideration, such for instance as "divers good causes and considerations," is not sufficient to support such a covenant. See Com. Digest, Title Cov. 9. 4. 5. and the cases there cited. It follows, therefore, that the plaintiff took nothing under this paper, whether it be regarded as a will or deed; nor can it operate as a covenant to stand seized to her use: so that in fact there was no interest arising out of it which entitled her either in Law or Equity to any claim or demand against the intestate, Bre-mar, or the defendant his legal representative. The

charge of the presiding Judge was, therefore, calculated to mislead the jury in this respect and for that reason a new trial is granted.

Motion granted.

THE STATE VS. THOMAS RYAN and JOHN JONES.

On an indictment for stealing the property of A. B. and C. proof that the defendant stole some of the goods of each of them respectively, in which they had no joint interest, does not correspond with the allegation, and new trial granted on conviction.

The defendants were indicted for stealing several pieces of money and other articles stated "to be of the proper goods and chattels of A. B. and C." It appeared in evidence that the money belonged to A.; some of the other articles belonged to B.; and some to C.; and that they were taken at different times and from different places. The defendants were convicted, and this was a motion for a new trial on the ground that the evidence did not support the indictment.

Dawson, for the appellant—cited 1 Chitty 138. 141. 513. Hobart 295. 1 Archbold 25. Carthew 225.

Cruger, contra—1 Chitty 248. 249. 253. 2 Burr. 984.

CURIA, *per* NORT, J.—It is laid down by Chitty that an indictment ought to have all the certainty of a declaration, for that all the rules that apply to civil proceedings are applicable to criminal accusations, 1 Chitty's Criminal Law, 141. 172. It is, therefore, necessary to state in an indictment for larceny, the name of the person to whom the goods belong; and, if they are laid to be the goods of one person and found to belong to another, the variance will be fatal, 1 Chitty's Crim. Law, 175. 213. Archibold 10. 11. 117. It may be laid in the indictment that the goods belonged to a person unknown, if that is

actually the case, yet if the owner be really known, the allegation will be improper and the prisoner must be discharged from the indictment, 1 Chitty ut supra. In this case the articles stolen are stated to be the proper goods and chattels of A. B. and C. The inference is that they are the joint property of those three persons. The proof is that some of the goods are the property of each of them respectively, but that they have no joint interest in any part of them. The proof, therefore, does not correspond with the allegation. Let us test the principle by analogy to the proceedings in a civil action. Suppose a person should be charged in a declaration with a debt due to A. B. and C. for goods, wares and merchandise, sold and delivered, &c. and it should come out in evidence, that a part of the goods belonged to A., a part to B. and a part to C., but that no part of them was the joint property of all. It will not be pretended that such evidence would support the declaration. But it is said that the only mode of taking advantage of such an error is by moving to quash the indictment before plea, or of compelling the prosecutor to elect on which charge he will try the prisoner, 1 Chitty Crim. Law 204. 249. But that rule applies only to those cases where distinct offences are separately charged in such a manner that the prisoner is apprised of the several charges to which he is called to answer. In such cases he is considered as having waived the objection by pleading to the indictment. In the case now under consideration, no error appears on the face of the indictment. The defendants could not know that they were charged with several distinct offences, until it came out in evidence. They ought then to have been acquitted on this indictment, and a new trial must therefore, be granted.

Motion granted.

**THOMAS YATES vs. W. YEADEN, Sheriff of the City
Court of Charleston.**

In an action against the Sheriff for an escape of a person from the goal bounds, the Plaintiff is not bound to prove the insolvency of the sureties to the prison bounds Bond.

The Sheriff alone can sue on the Bond, and the Court at its discretion may stay the proceedings against the Sheriff until he can recover on the Bond.

The Sheriff can retake the prisoner, and put him into close confinement.

The question in this case was, whether in an action against the Sheriff for an escape of a person from the goal bounds, it is incumbent on the Plaintiff to prove the insolvency of the surities given by the prisoner to keep the bounds, before he can maintain an action against the Sheriff for the escape. The case was tried before the Recorder of Charleston, who nonsuited the Plaintiff, who appealed.

CURIA per NOTT, J. It does appear at first view to be somewhat harsh to make a Sheriff liable for the escape of a person over whom he had no control, except the Bond which he has taken for his continuing within the prison rules. But when we look to the object and the provisions of the act, the decisions of our Courts which have arisen under it, and the duties and privileges of Sheriffs, arising from the nature of their office, I do not see how we can come to any other conclusion. The act expressly declares that the Sheriff shall be responsible for the solvency of the security which he shall take. He is made the sole judge of its competency, and therefore, is not obliged to accept of any with which he is not perfectly satisfied. It has been held that even though the surety were adequate when the Bond was executed, if he become insolvent afterwards, the Sheriff shall be liable.—1st Dallas 349. *Clarke vs. Moore*, Const. Rep. Tread. 156.

The Bond is considered as an indemnity to the Sheriff and not to the party; *City Council vs. Prince*, 1 M'Cord

299. It has also been held that the bond cannot be assigned; *Peck vs. Glover*, 1 Nott & M'Cord 582. The plaintiff therefore has no controul over it, and would be without redress, if he could not resort to the Sheriff. No injury can result to the Sheriff by this construction of the act; because if the security be good, he is indemnified, and it is his own fault if it is not. The Court in its discretion may stay the proceedings against him until he can recover against the party who is answerable to him.— Besides, the Sheriff is permitted to make fresh pursuit, to retake the prisoner and put him immediately into close confinement. But the Plaintiff in the action cannot know that any security has been given. He may not even know that the Defendant has escaped, until long after it has happened. And even then not having a right to an assignment of the bond, he can have no remedy but against the Sheriff. The Plaintiff is not supposed to know the circumstances of the person who has become the surety. The Sheriff does not labor under that difficulty, because he is chosen by himself. The security of the Plaintiff depends upon his right to resort immediately to the Sheriff: and the policy of the law requires that we should give it that construction. The case of *Clark and Moore* is not well reported. It is represented as being an action against the Sheriff for not taking good security; but it was in fact an action for an escape, and the only question made was, whether the subsequent insolvency of the surety, which was good when the bond was taken, would exempt the Sheriff from liability: the Court held that it would not, and judgment was rendered for the Plaintiff. Allowing a person the benefit of the prison rules, is nothing more than an extension of the limits of the goal. All the liability attaches to the Sheriff, as if the prisoner was actually within the prison walls; and the bond which he is permitted to take, is only a substitute

for the security which the walls of the gaol previously afforded against an escape. The goal is in the eye of the law the house of the Sheriff; but in certain enumerated cases, he is required to let his prisoner go abroad within certain limits, and is permitted before he allows him such indulgence, to take ample security that his confidence shall not be abused. See *Waln vs. Collingwood*, 1 *Wilson* 262; *Gilbert on Replevin* 67, do. 177; *Janson vs. Hilson*, 10 *John. R.* 549; *Barry & Harbrick vs. Mandell*, *Ib.* 563.

Motion granted.

OCTAVIUS CRIPS, and others, vs. ANDREW TALVANDE.

Where the Tenant holds over his term, and the Landlord recovers double rent under the act of 1808, he cannot bring case afterwards against the Tenant for holding over, whereby he lost the sale of the premises. *Quere?* If the Plaintiffs under any circumstances could recover for such remote consequential damages?

To determine whether causes of action are the same, the same evidence must be necessary to support them.

Where a party has been injured he cannot bring suit for one part and another suit for another part. If the cause of action is entire, but one suit can be brought.

This was an action on the case tried at Charleston, May Term, 1825, before Mr. Justice Huger. The Plaintiffs had leased a House and Lot to the Defendant, who held over after the term of his lease had expired. The Plaintiffs commenced a suit under the act of 1808, for double rent for the time held over, and recovered. This action was brought to recover special damages, on the ground that the Plaintiffs had agreed to sell the premises to one Ball, who had withdrawn from the contract in consequence of the Defendants holding over, Ball not being able to get possession within the time specified. The premises had been sold for less than Ball offered; no oth-

er person being willing to give as much. The Jury found a verdict for the Plaintiffs, with a memorandum stating that it was made up by deducting the former verdict for double rent from the amount of damages. The Defendant appealed.

Grimke for the Defendant. The act of 1808 allows the Landlord to recover double rent, when the Tenant holds over, and prescribes the remedy. This remedy has been resorted to, and admitting that trespass or case would lay, they are taken away by the election to pursue that remedy. 4 Burr 2225; 1 L. Raymond 692; Cro. Jac. 73; Yelverton 63; 4 Mass. 433; 4 Johns. 119; 1 Bay 214; 1 Wm. Black. Rep. 273, 387; 3 Burr 1845.

Toomer, and *Petigru* Atty. Gen. contra. If the evidence in the two suits is not the same, then the former suit is no bar to this. That is the test. The remedy given by the act of 1808 is intended to cover only the value of the use and occupation; so that consequential damages could not be recovered in that suit, and therefore this suit is brought. 5 Burr 2694; 7 Johnson Rep. 20; 1 New Rep. 174; 8 John. R. 383; 9 East. 436. No notice to quit was necessary in this suit, as in the other.

As to the damages: If one suffer a loss by the act of another, whether voluntary or not, he is answerable.—The loss here was clearly proved. Com. Dig. 288; 1 Domat 390; 1 Mass. Rep. 145.

Hunt in reply.

CURIA per JOHNSON, J. The authorities cited at the bar by the Counsel opposed to the motion, fully establish the position, that the true test by which to determine whether the causes of action are the same, is to enquire whether the same evidence will be necessary to support them. When a tenant holds over after the expiration of the lease, the act of 1808 subjects him to the payment of double rent, and gives the Landlord a remedy by action

or by distress. To this remedy the Plaintiffs have resorted, and have had their redress ; and the question now is, whether the injury complained of in this action is the same. In the application of the rule, it has been contended that in that action all that was necessary to be proved was that the Defendant was the Tenant of Plaintiff, that he had notice to quit, and that he held over ; that in this case, proof of notice to quit might be dispensed with, and that to sustain it, proof of the contract to sell to Ball, the knowledge of the defendant, and the loss on the sale were necessary ; and hence it is concluded that the causes of action are not the same. This is clearly a misapplication of the rule. The act of the Defendant, and for which the Plaintiffs seek redress, is the same in both cases ; the fact of holding over after the expiration of the lease. And the rule must be understood as applying only to the act done by the defendant, and not to the damages which the Plaintiff has sustained. It is the wrong done, and not the character or quantum of damages which constitutes the identity. The wrongs complained of in these two cases are identified by another circumstance too striking to be omitted. The Jury have endorsed on the back of the record a memorandum from which it appears that after estimating the damages claimed by the Plaintiff in this action, they have deducted \$1850, the amount of the former verdict, and found the balance for the Plaintiff. The admission that the damages claimed have been sustained and were recoverable, gives rise incidentally to another question, and that is, whether the plaintiff can resort to a second action when a recovery of a part of the damages only has been had in the former action. The rule on this subject is also well settled. When the cause of action is entire, or in other words, when the act complained of is indivisible, a Plaintiff cannot separate it and bring one action for one part, and another for another ; the first will

be a bar to the second, as in the case of *Bond vs. Quattlebaum*, 2 Nott & M'Cord 205, where the Court held that a former recovery in Trover was a bar to another action for a part of the same property. See also 15 Johnson Rep. 229; 16 do. 136. From this view of the case, it is impossible that the Plaintiff can recover, and leave is therefore given to the Defendant to enter up Judgment as in the case of nonsuit. The Court do not by their silence in relation to the fourth ground intend to give currency to the opinion that the damages claimed in this case are in their nature such as the Plaintiff would be entitled to recover in any form of action—the Court gives no opinion on that point. My own impressions however are that they are not recoverable. The rule on this subject I take to be this : that the damages to which the Plaintiff is entitled are those which proceed immediately and necessarily, as contradistinguished from remote and contingent, from the wrong done. The wrong done in this case was the Defendant's holding over. The damages immediately and necessarily resulting from it, consists in the loss of the use and occupation, and other matters immediately incident to and connected with this right. But here the Plaintiff claims to superadd to them a supposed loss in consequence of Ball's declining to purchase, and which, if he was not bound, he might or might not have carried into effect, and a few more additions founded on such speculations would multiply the damages to an incalculable extent, and appeared to me to be too remote to be the foundation of an action.

Motion granted.

VINYARD Ex'or. C. BUTLER, v. C. BROWN, et. al.

An executor party to an issue of devisavit vel non, though he takes nothing by the will, cannot be examined as a witness in the cause.

General rule, that no party to a cause can be examined as a witness.

This was an issue devisavit vel non. It was contended that the pretended will was a forgery. The jury found against the will, and the case was taken up to the Court of Appeals, on the ground that Mr. Justice *James*, who tried the cause had rejected the evidence of Mr. Vinyard, the executor and party to the record, who was offered to prove the circumstances under which the will was found.

Lance, for the appellant.

Hunt and Memminger, contra.

CURIA, per JOHNSON, J.—The general rule is that a party to a suit on record cannot be a witness. The interest which he has in the subject matter in litigation where he sues in his own right and the consequent temptation to perjury is the foundation of the rule. Where he sues in his representative character, as trustee, prochein ami, or executor his liability for costs creates an interest which is embraced by the principle and renders him incompetent, 7 Tem. Rep. 668. 1 Str. 505. 543. 1 Burr. 444. nor indeed can any one be a witness who has a direct interest in the event of the issue, however inconsiderable that interest may be. With respect to the parties of record, I know of but two exceptions which have been allowed to this rule. The first is when they are admitted for the sake of trade and the common usage of business. On this principle merchants, shop-keepers, &c. are permitted to prove their book entries—and secondly from necessity within which it is supposed the present case falls. It is not, however, every necessity that exists in fact which renders them

competent; for that would arise in every case where there was no other proof and would entirely subvert the rule; but it is allowed in those cases only where from the nature of the transaction, no other proof could reasonably be expected. The case of *Burdett vs. Hertford Hundred*, 2 Roll. Ab. 685, cited Bull. N. Prius 289b, Bridgeman's Edition, is an illustration of this exception. That was an action on the statute of Hue and Cry and there the plaintiff was admitted to prove the amount lost, because from the nature of the transaction, no other evidence was reasonably to be expected; and the reason on which the court proceeds is that the remedy given by the statute would be inoperative, unless such evidence was received. I have not been able to discover that it has ever been applied by the English Courts to any other case; and I am not disposed to enlarge the sphere of its operation. The case of *Cantey vs. Sumter*, 2 Bay 93, is relied on in support of the affirmative of this proposition; but on looking into that case, it will be seen that it could not have turned on that question, as is fully demonstrated by a review of it in *Packhard vs. Knight*, 3 M'Cord 71, and the note. *Lenox vs. DeHaas*, 2 Yates Rep. 37, is clearly not within the principle of the exception, and the judgment of the court in that case was in all probability founded on the usage of the court or its peculiar organization and is not obligatory on this court. In any view of this question the plaintiff here was inadmissible. The circumstances were not such as in their nature to exclude the probable existence of other evidence; nor did the necessity exist in point of fact. The witness Mrs. Saunders was present when the paper was found and gave evidence of the condition in which it was. It is said, however, that the plaintiff ought to have been admitted because he was not beneficially interested in the subject matter of litigation, and as costs are not allowed on a

feigned issue, he incurs no responsibility on that account. It is difficult, if not impossible to conceive a case in which a party has no interest in the event; they appear to me to be inseparable, and if such a case should arise, I should be disposed to think that he ought not to be admitted. The rule itself is founded on motives of public policy and its value consists in the universality of its operation, and we know that one exception usually gives rise to another and when once the door is opened, they multiply in endless succession until the rule itself is subverted. But there is no doubt as to this case. The plaintiff here has an interest that cannot be mistaken. He takes, it is true, nothing under the will, nor can the costs of the trial of this issue be taxed against him by this court, but that he is responsible for his own costs and for the expenses of the proceedings in the Court of Ordinary, there is no doubt; and the probability of being indemnified depends on the event of this cause. He was therefore clearly inadmissible.

Motion refused.

M'CLURE vs. PYATT.

~~Though a contract for Overseers wages be to pay a gross sum by the year, the Jury may, when the parties have differed and separated before the end of the year, apportion the damages to the services actually rendered, to effect substantial justice.~~

This was an action of assumpsit for Overseers wages, tried at Charleston, January, 1826, before Mr. Justice Gantt. The contract was proved for \$100 per annum. The Plaintiff, the Overseer, was sick and idle, quarrelled with the defendant after a month or so, and struck her. He was discharged by the defendant, and he went off taking the keys with him. The defendant offered to pay him pro tanto.

The Jury found a verdict for the plaintiff for \$120.—
The defendant appealed, and moved for a new trial.

Petigru and Cruger for the appellant.

J. B. White contra.

JOHNSON, J. In the case of *Boyd vs. Bird*, decided at the last sitting in Columbia, which, was an action by an Overseer against his employer, the Court determined after great deliberation, that although the contract was to pay a gross sum for a year's service, the Jury might when the parties had differed and separated before the end of the year, apportion the damages to the services actually rendered, if upon a view of all the circumstances that course was best calculated to effect substantial justice between them, and that case is referred to for the doctrine of law on the subject. The application is all that is necessary to this case. The Jury have under very extraordinary circumstances found a verdict for even more than the plaintiff was entitled to according to the contract proved; and it is impossible from the case now presented to the court to reconcile the verdict to common sense, without supposing that the jury acted under a mistake with respect to the rule, with regard to which they were not decisively instructed by the court. It is proper therefore that the case should be sent back for a new trial, and it is ordered accordingly.

Motion granted. (a)

(a) See *Clancey v. Robertson*, 2 Constitutional Reports 404; *Scott vs. Baldrick*, Ib. 410; *Adams vs. Cox*, 1 Nott & M'Cord 284.

JAMES D. MITCHELL Ordinary, vs. PETER FAYOLLE.

By the act of 1788, simple contract debts due to Citizens of this State are put upon the same footing as specialties, in the administration of the assets, within the State, of a deceased person not a Citizen of South Carolina. But the debts of Citizens are not to be paid in total exclusion of debts to foreigners.

This was an action on the Administration Bond of Charles Gilfert, Administrator of S. G. Holman, an alien, against the Defendant Fayolle, the surety. The question made, was whether the act of 1788, P. L. 464, was repealed by the act of 1789, P. L. 494. The act of 1788 provides, "That where any person, not a Citizen of this State has died, or shall die, already indebted to a Citizen of this state, the assets and effects within the same, of such deceased person being sufficient [insufficient the Court thought was intended] for the payment of all his debts, shall be liable to discharge the debts due to the Citizens of the State in the same manner as if the same had been liquidated by bond or other specialty, any law, usage, or custom, to the contrary notwithstanding."

The act of 1789 directs generally, that in the payment of debts of a deceased person, Bonds and Obligations shall be paid before simple contract debts.

Mr. Justice *Gantt*, who heard the cause, decided that the act of 1788 was still of force, being a particular provision, unimpaired by the act of 1789 providing a general law.

The Plaintiff, who claimed to have a foreign bond paid before simple contracts in this State, appealed.

DeSaussure & Ford, for the motion.

Eckhard, contra. 9 Mass. R. 257.

CURIA *per* NORT, J. We concur with the Circuit Judge. The object of the first act was to give our own Citizens a preference over foreigners, so far as regards the administration of the effects of a deceased alien which are at the time of his death within this State. All the debts due

by aliens to the citizens of this state, whether by simple contract or otherwise, are put upon a footing with bonds or other specialties. The act of 1789 merely declares the order in which debts shall be paid, giving bonds and other specialties, a preference in that respect over simple contract debts. The two acts therefore, may very well stand together, the first placing simple contracts on a footing with bonds and other specialties, in the particular case provided for, and the other directing that in all other cases specialties shall be preferred. A question with regard to the construction of the act of 1788 has been raised, which seems to be thought somewhat more difficult, though to my mind so plain that it seems rather to be obscured by an attempt at illustration. It is contended that the act requires the debts of our own citizens to be paid first, to the total exclusion of foreigners, but I can find nothing in it from whence such an inference can be drawn. The preamble does to be sure say, "Whereas it is just and reasonable that the assets in this State, should be answerable for the debts due to the citizens of the State, of whatsoever nature or kind the same be," yet the enacting clause goes on to shew in what manner they shall be paid, that is, "in the same manner as if the same had been liquidated by bond or other specialty." If it had been the intention of the act to subject the assets in this State exclusively to the payment of debts due to the citizens of this state, the intention might have been expressed in much fewer words than have been employed.—There would have been no necessity for converting their simple contracts into specialties for that purpose. I take it therefore, that the preference to which they are entitled is precisely that which the act allows ; the preference which is to be derived from having their simple contracts placed upon a footing with bond or other specialties, and nothing more.

Motion refused.

BANK OF THE UNITED STATES V. BROADFOOT & M'NIELL.

In this case it was decided, that where one of several partners is resident here or within the jurisdiction of the Court, the absent copartner cannot be made a party defendant in a process against the firm, by attachment either directed against his private property, or the property of the firm, and that the only mode of making him a party, is by serving the usual process on the resident partner, in the manner prescribed by the act of 1792. 2 Brev. 171.

THE STATE V. THOMAS CHREITSBURGH, and THE STATE V. WILLIAM THOMPSON.

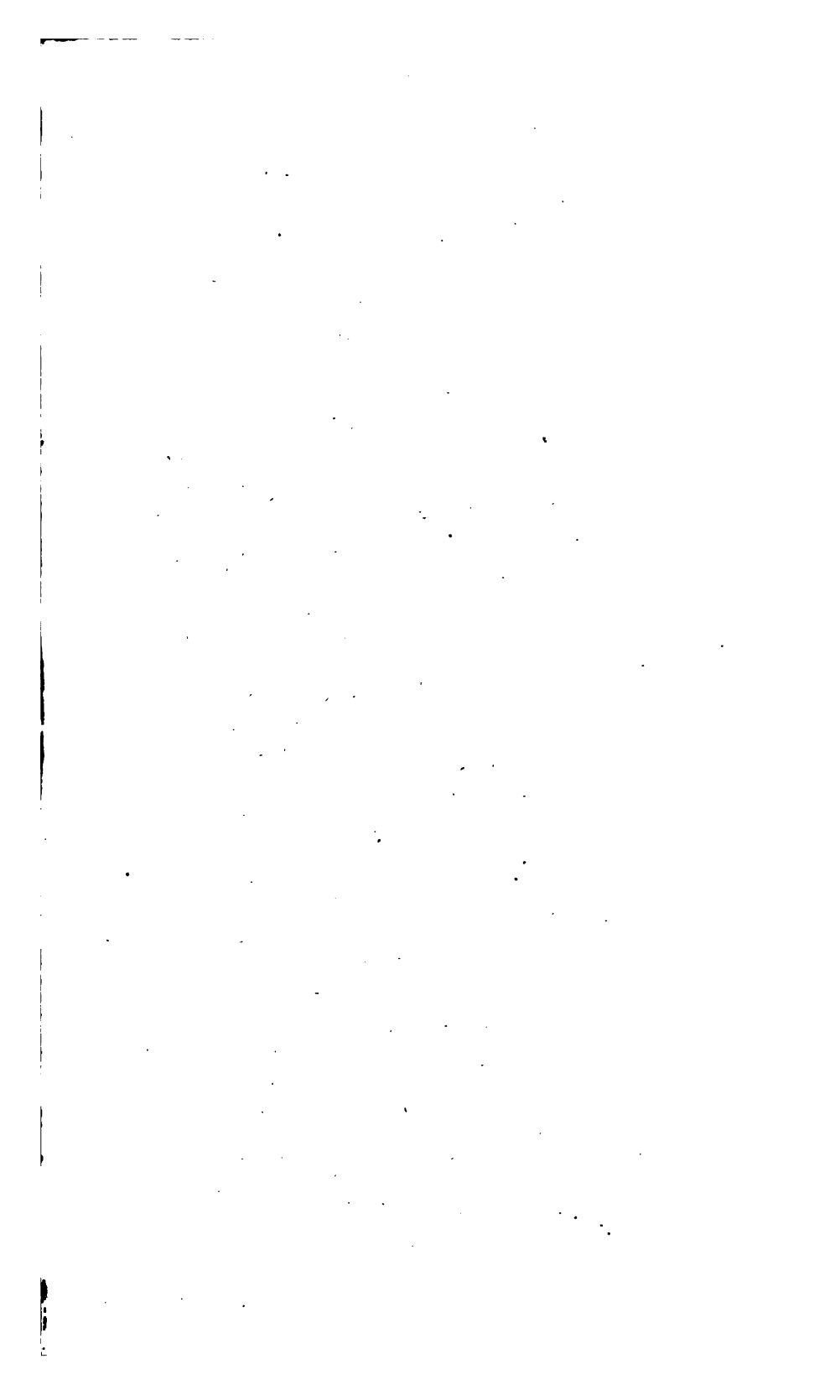
These were cross indictments for assaults and batteries, and tried together. The defendant Chreitsburgh, offered no evidence, and his counsel Mr. *I. E. Holmes*, contended that he had the right of reply, which was claimed by the Attorney General. The Recorder of Charleston decided in favor of the Attorney General, and the defendant appealed.

The Court held that in ordinary cases, where the defendant offered no evidence, his counsel were entitled to the reply, but where cross indictments were taken up and tried together, and the defendant's witnesses are examined on the indictment which he preferred, that the State is entitled to the reply. The State v. Brisbane, 1 Bay 453, was referred to by the Court.

Motion refused.

THE STATE V. THE COLLECTOR OF FINES, &c.

The Act of Assembly exempting certain persons from the performance of "*ordinary musters*," only exempts them from *Company parades*.



[The intervening Columbia Term has been published in the 3rd Volume.]

LAW CASES

ARGUED AND DETERMINED IN

THE COURT OF APPEALS, OF SOUTH CAROLINA,

IN

NOVEMBER TERM, CHARLESTON, 1826.

JUDGES PRESENT.

HON. ABRAHAM NOTT, *Presiding Judge.*

HON. C. J. COLCOCK,

HON. DAVID JOHNSON.

H. SOMERALL vs. WILLIAM HASSELL GIBBES, Master in
Equity.

A master in equity is liable at law, to an action on the case, for a neglect of duty, as an officer of that court, by any one who may be injured by such neglect.

This was an action on the case tried before the Recorder of Charleston, against the defendant as Master in Equity, for negligence in taking insufficient surities to a guardianship bond, contrary to the order of the Court of Equity. The plea was the general issue. On the case being opened, the Recorder requested the point to be argued, whether a Court of Law had jurisdiction of the cause.

After hearing the argument the Recorder non-suited the plaintiff, on the ground that the Court of Law had jurisdiction only of cases *ex delicto* where they arose from the omission of some legal duty or the commission of an act forbidden by the laws, producing injury to a plaintiff; that here the master was charged with an omission to perform what is termed a legal duty, but it was a duty not enjoined by the law, but prescribed by an order of the Court of Equity, and he thought that court alone could take jurisdiction of the matter.

The plaintiff appealed.

Findley, for the appellant, cited 5 Bac. 212. 213. tit. Officer. 6 Mod. 95.—All officers are liable by suit at law for injuries arising from their neglect, 1 Com. Dig. 414. Here the defendant took an insolvent person as surity, which was a gross violation of his duty, and an injury to the plaintiff, which was sufficient to support an action. He referred to the act of 1780 first establishing the Court of Equity. Taking the office is considered as contracting on the part of the officer to indemnify every one against any injury which may come to them by his neglect or malfeasance of office, Co. Litt. 233. 3 Black. Com. 165. Holt's opinion in 1 Bac. Action on the Case 92, which was afterwards sanctioned by the House of Lords, 1 Bac. 95. 3 Campb. 388. He cited the act in 1 Brev. Dig. 205, to show that the commissioner gave bond, that he might be thus liable. The plaintiff might have sued on that bond. The same difficulties would occur in such a case as in this. If the action on the bond is maintainable, why not this action? The defence could be made as well at law, as in equity. The cases relied on in *Eden on Injunctions* 3. 2 Dickens 619. 1 Vern. 269 were cases where a legal defence could not have been made.

Gadsden contra.—Lord Coke says, that an act has never been done, is a reason why it never should be done. In

a case of quo warranto the Court did refuse to go into the matter, because a complete remedy could be had elsewhere, in a tribunal more especially adapted to the purpose. And admitting the court of law had jurisdiction, yet the courtesy due to the court of equity, where in fact the matter more properly belonged and where justice might be more properly administered, should induce the court of law to refuse its aid. The court of equity certainly could investigate the matter with more ample facilities. By its orders every thing may be much more fully examined than can be done before a jury. A trustee cannot be made liable in any other court than in equity. The encroachments of the courts upon the jurisdictions of each other should be very strictly guarded against.

A mere equity has never been held a sufficient cause to maintain a suit at law. Suits upon the bonds of officers are given by statute, and could not have been maintained at common law. The court of equity may assess damages, in such cases as this, involving accounts, or a matter accountable for.

The act does say the bond may be *sued on*. But it does not say a suit at law. It gives a remedy, but leaves the form of the remedy to be determined by the proceedings of the courts. But this remedy upon the bond is a special remedy, and excludes the idea of a remedy by action on the case.

The cases in Bacon are no doubt founded on some statute which creates some *legal* obligation, remediable in a court of law. The inconveniences attending the proceeding at law should prevent the court from encouraging the maintenance of such actions. The courts of law will not now entertain a suit for a legacy; and they have refused to permit equitable matters from being put upon the record. Otherwise all distinction between the courts would be destroyed, 2 Bos. & Pul. 45. 7 East 143. 8 East 344. In

3 Caines Reports 22, debt was held to lie on a decree in the court of chancery. But he could not consider that case as law. Chancellor *Kent* dissented. Eden on Injunctions 27. 1 Vern. 269. 2 Dickens 619. 2 Atk. 162.

M'Cready in reply—All public officers are liable for breach of duty, 2 Nott & M'Cord 134. 9 John. 385. 1 Salk. 18. If the duties be such as are to be performed by the master it is sufficient to show that he was master, the duties neglected and the injury. If the master is ordered to perform a certain duty the production of the order is sufficient evidence of the duty. 4 Wheaton 220. 1 N. & M'C. 328, 1 M'Cord 495. Ib. 507. The power of that court to make the order was well known in every court, 6 Wheaton 109. 2 Nott & M'Cord 329. Besides the bond, the master is liable in consideration of the fees he receives. Equity could not assess damages. How then could the plaintiff recover there?

CURIA, *per* JOHNSON, J.—Whether the plaintiff has or has not declared for a sufficient cause of action does not enter into the consideration of this case. It is concluded by the judgment of the court below which proceeds entirely on the ground that the defendant, as an officer of the court of equity, was not bound to respond in a court of law for damages sustained by his neglect of duty, but was amenable only to the tribunal of which he was an officer; and all the grounds of this motion are resolved into that single question. It is a general rule that every breach of a public duty, or neglect of what a party is bound by law to perform, working wrong or loss to another, is injurious and actionable, 1 Term Rep. 509. 2nd do. 667; and it is equally incontrovertible that an action on the case which is peculiarly or exclusively of common law cognizance is the appropriate remedy for such an injury, (*vide* 1 Bacon's Abr. Action on the case for negligence A. 2.). These as general positions have not been controverted, but it has

been contended in opposition to the motion that every court claims the exclusive right to punish its own officers for a dereliction of duty; and a distinction has been attempted between that class of duties which are imposed by positive law and those which arise incidentally and are created by the act of the court; to the last of which, it is said the neglect complained of in this case, is referable. It may be admitted that so far as the judgment of the court is to act exclusively on its officers, as a punishment for their delinquencies, the first of the foregoing positions is well sustained, but the party who is injured has rights also which are not to be overlooked. He has a right to look for redress to that tribunal to whom the law has confided the jurisdiction of, and applies the remedy, to the particular wrong complained of, and whatever the rule of law may be in England, I have known no instance in this country where a personal privilege of this sort has been claimed or allowed. Besides an action on the case is one sounding altogether in damages; and, as wide as the range is which the courts of equity, both in this country and in England, have taken in pursuit of increased jurisdiction, they have, I believe, never gone quite so far as to claim exclusive jurisdiction over the subject of damages; and if, as it is said, there is no wrong without a remedy, it must be a matter of common law jurisdiction. The distinction between those duties which are enjoined by positive law, and those which arise incidentally appears to me to be without foundation, so far as respects the party injured; for whether the injury proceeded from the one source or the other, it would be incumbent on the plaintiff to show that the duty was imposed, that the defendant had neglected to perform it, and that he had sustained an injury. And if it be true that the laws or the rules of a particular jurisdiction are locked up with the arcana of the closet, so as to be inaccessible or so mysterious as

to be incomprehensible to the ordinary tribunals of justice, he must of course fail in his action. But I apprehend, that this is not the true legal inference. Every one is presumed to be acquainted with the law which prescribes rules for his conduct, whether it be paramount or subordinate; and if this presumption applies to individuals, it may be allowed to extend to the tribunals of justice. Again, it does not appear to me that there is any insurmountable difficulty in one court's giving an exposition and effect to the laws or rules by which another is governed. To illustrate that there is not, let us suppose that a sheriff has neglected to make money on a fi. fa. issued out of the court of chancery. Now this duty is enjoined on him by positive law, about which there is no mystery or perplexity and his liability follows of course, if the party complainant has sustained an injury. But let us suppose, as the distinction contemplates, that the negligence complained of arose incidentally and out of an order made by the court. If there be any difficulties in the interpretation of the order itself, or in the mode of its execution, these it is true must be solved by the laws, rules and practice of the tribunal from which they emanated, but they as before shown are supposed to be known and understood by all; and whether the order was illegal or not can never enter into the case, for every order, decree or judgment of a court having jurisdiction over the subject matter is the law of the case until it is reversed or annulled. We are, therefore, of opinion that the motion should be granted and that the case should be sent back to the city court for trial.

Nonsuit—set aside.

IN THE MATTER OF JOHN ELCOCK'S WILL.

The Testator in 1823 made his Will of personal property, which was properly executed according to the laws at that time. By an act of 1824, three witnesses were required to Wills of personal property, and the testator died in 1825, leaving no other will. The will having but two witnesses is void.

A Will as to personal property is considered as having existence only from the death, and not from the time of its execution—and it must be executed according to the requisites of the law at that time.

This case came up to the Circuit Court of Charleston, on an appeal from the Ordinary. A paper purporting to be the will of John Elcock was propounded for probate, having only two witnesses. It bore date and was executed on the 9th of March, 1823. Objection to the Will—That by the act of 1824, three witnesses were required to all wills of personal property, “from and after the first day of May then next.” That the testator did not die until the first of May, 1825. To this it was replied that the will had been executed before the act was past, and was therefore not affected by it. The Ordinary gave judgment against the will, and upon appeal, Judge *Richardson* who heard the cause, agreed in opinion with the Ordinary, and the jury found a verdict against the will.—From this verdict the appeal was taken up.

King for the Will. The act of 1824 was prospective. To construe it in any other way was contrary to just principles. The general doctrine is, that the will takes effect from the execution. The will was valid at its execution, and remained so up to the time of passing the act, and to say that the act rendered it invalid was to admit that it had a retrospective effect. The statute of 1824 was exactly analogous to the statute of wills. *Grimke P. L. 82*. It is copied from the statute of frauds. The construction under the two acts must be the same. This law has not affected all wills. It has not abolished wills *donatio causa mortis*. An act ambulatory, as explained by *Ulpian*,

only means an act that may be changed. But it is good if not altered. *Mathew v. Warner*, 4 Ves. 200; *Slade v. Cooper*, 1 Phil. 336, *n(a.)* 2 N. & M'C. 482. It had been ruled in England that a will executed before the statute of frauds, was good, though the testator died afterwards.—*Gilmore v. Shooler*, 2 Mod. 310. This case was exactly in point; the words of the two statutes being exactly the same. So in *Noel v. Clark*, 3 Mod. 218, where the will had been executed but with one subscribing witness, before the statute, it was held good, though the testator died afterwards. *Ashburnham v. Bradshaw*, 7 Mod. 239; *Sergeant v. Punter*, Prec. in Chan. 77; *Skinner* 227; *Downs v. Townsend*, Ambler 280; *Addington v. Andrews*, 3 Atk. 149. The civil law doctrine was the same. Voet. 2 vol. 272; Cod. Lb. F. 3 L. 10. Inst. L 1, T 2, par. 6. In France the same doctrine is maintained in the Code Civile, and in the notes to the Code cases are cited. He also cited Poth. on Test. Would the court now change the principles of the law, under which we had lived for more than one hundred years. Suppose our ambassador Mr. Poinsett, who is absent in Mexico, had died soon after the passing of this act, without complying with its provisions, would his benevolent intentions have been thwarted by a construction varying from the uniform decision of years?

Finley, against the Will. This case was within the act, unless excepted by the act itself. But the act excludes the idea of any such exception. The will was ambulatory till the death of the testator, and therefore within the provisions of the act, the testator having died subsequently. If the legislature did not intend to comprehend cases of this sort, would the exception not have been expressly made in the act, the case being one so apparent. Suppose the property had been acquired after the passing of the act; would it not be allowing a transfer of property in a particular way which the legislature

had prohibited. As to the civil law, and to the array of French authorities which his friend had made, he could only say, that he did not understand French, and therefore could not answer for their applicability : but French law was not our law. As to the English cases they were contradictory; and those especially from Prec. in Chan. , Skinner and Modern were not applicable. In 7 Bac. ab. 299, it is said the will of a papist is void, having been executed before the statute, its legal effect being from the death and not the execution. The same case there cited, of Buch v Morgan, was reported in 7 Mod. 240. See Viner tit. Devise. The will was held subject to the law existing at the death, though enacted after its execution. Dyer 143; Com. Dig. tit. Devise. A new publication is required after the act. There was a substantial difference in this respect between testaments and wills. A devise is looked upon as a conveyance at the time it is made, with a power of revocation, and a testament of personal property on the contrary is considered only as taking effect at the death of the testator. It is said not to have any life till then, which expression was used as in contradistinction to the operation of a devise. The property under a devise is considered as having vested at the execution, and to construe a will as only operative from the death would often be to divest the right. 1 Rob. on Wills 231, 232; 7 Mod. 242. Besides, a devisee to all one's children vests only in the children then in existence. 2 Salk. 591; Cowp. 97; 6 Cru. Dig. 69; Amb. 451. A will speaks at different times, as to the different estates, real and personal. In this case the party had time enough to alter his will conformably to law.

King, in reply. The cases cited by the gentleman supported the positions he (Mr. *King*,) had assumed. More fraud (as Lord Mansfield said,) had been committed under the statute than before. Fraudulent wills are apt to be

punctiliously executed. 4 Burn. Ecc. L. 84. The greatest judges in England had stated that the law of testaments had been taken from the civil law, therefore that law was applicable. In 2 Edens Ch. R. 254, the editor in a note says, that he could find no entry in the Register's Books of the case of Ashburnham & Bradshaw, which case alone stands opposed to all the cases in the English Books, and that case was decided by Lord Northington, who never did regard authority.

CURIA per NOTT, J. The question submitted to us in this case, was decided at our last sitting in Columbia, in the case of Houston vs. Houston, 3 M'Cord 491. That case was submitted to the Court without argument, and the opinion made up and delivered in the hasty manner in which many of our decisions necessarily must be amidst the pressure of business under which we labor. It was however founded on what was thought to be a very familiar principle, to wit, that all the personal estate which a man has at the time of his death passes under his will, although acquired after the time of its execution—from whence it was concluded that the will must be considered as having existence only from the time of the death, and not from the time of its execution; and if it is to take effect from the time of the death only, it must be executed according to the provisions of the law at that time. In support of that construction of the act, we not only have the unanimous opinion of this Court, but the concurring opinions of two Ordinaries, and two of the Circuit Judges on the same point. We have, nevertheless, upon the solicitation of the counsel for the appellant, submitted to an argument with a view of giving the question a further consideration, and to afford an opportunity of looking into the authorities upon the subject. And I am now authorised to say, that the argument has produced no change in the opinions of this court. With regard to

those passages from the Civil Law and the Code Civile, which have been relied on, even if they admit of the construction which the counsel supposes, they cannot affect the question. We never resort to the civil law as authority. It may be recurred to for the purpose of illustrating those principles of the common law which have been derived from that source, and no further. And no case has been adduced from any of the books, either in law or equity, in support of the doctrine contended for on the part of the appellants, which is thought applicable to the case now under consideration. The strongest is perhaps that of *Downes vs. Townsend*, and others, *Ambler* 290, where Lord Hardwicke is reported to have made use of the following observation: "The general rule as to testaments is, that the time of the testament, and not the testator's death is regarded." But that dictum must be taken with reference to the particular question to which it was applied. Lord Hardwicke was looking for the intention of a testator as expressed in a specific bequest, contained in a testamentary paper. It was the intention alone of which he was speaking, and not of the execution nor of the time from whence it would take effect. He said, and undoubtedly said correctly, that the general rule was, the time of the testament and not the death of the testator. We must suppose that when a person is disposing of property he must mean the property which he possesses at the time, because he cannot know what property he may in future acquire. When therefore, a person makes a specific bequest, he must necessarily refer to some specific thing then in his power or possession. And yet in the same case, Lord Hardwicke says, where the legacy is universal, as of all a man's goods, or even where it is specific, if of property in its nature fluctuating, as a flock of sheep, it must relate to the death. Several cases have been quoted from *Mod-*

ern Reports, but the one principally relied on is *Ashburnham vs. Bradshaw*, 7 Modern 239. That was a devise made before the statute of George II. avoiding devises to charitable uses, and the testator died afterwards. It was referred to the judges to determine whether the will would still take effect, or whether it was revoked by the statute : and ten out of twelve of the judges held that the land would still pass under the will, but they gave no reason for their opinions. Besides that was a devise of real estate ; and a distinction has always been made between a will of real and personal estate. One which all the books concur in is, that a will of real estate carries only the land which the devisor has, at the time of making the will, but that a testament of personal estate carries all the goods which he has at the time of his death, although he may have acquired them after making the will. And that distinction is relied on by Lord Chancellor Northington, in the case of the Attorney General vs. Hartwell, Ambler, 451, where a will of personal estate came under his consideration, depending upon the construction of the same statute of George II. In speaking of the case of *Ashburnham vs. Bradshaw*, he says, "That was the case of real estate, but as to personal estate it admits of a different consideration." And in that case he held that the will was rendered void by the statute. We are told in the argument that the decrees of Lord Northington are not to be relied on as authority.— We cannot consider the single decision of any English judge as conclusive authority ; but it would be very difficult to fix a scale by which to ascertain the exact degree of credit to which they are respectively entitled. We can only allow them the weight to which we think they are entitled according to the notions we may entertain of the general principles of law to which they relate. It is said in Ambler 451, that when the Lord Chancellor first star-

ted the distinction between real and personal estate, as affecting the question, it was a surprise upon the counsel on all sides: from whence it is argued that they were surprised that such a distinction should be made. But I apprehend that all that was meant by that observation was that the distinction had not occurred to the counsel, and not that it was so new or extraordinary that they were surprised to hear it from the bench. But Mr. Eden, who has collected the decisions of Lord Northington from his own original manuscripts, does not find that remark contained in this case. He has indeed introduced it into his report, but it is inclosed in a parenthesis and given upon the authority of Ambler alone, and not of the Chancellor, 2 Eden 284. But the distinction is as well settled as any rule of law whatever, and goes to reconcile all the cases on the subject. It may be an arbitrary one, but it is not more so than many of the distinctions between real and personal property, which are nevertheless obligatory upon this Court. It is also to be observed that Modern Reports are not of the highest authority. Of the 6th Volume, it is said that it is "a book of no repute;" the 8th a miserable bad book; the 10th of little authority; and the 11th a book of no authority; and these are the opinions of Lord Hardwicke, Lord Mansfield, and Judge Buller; and if I were under the necessity of expressing an opinion on the case of *Ashburnham vs. Bradshaw*, I should feel much disposed to concur with Lord Chancellor Northington, "that a great deal might be said against the determination." But without resorting to any other authority than the act itself, I should come to the same conclusion. It will hardly admit of any other construction. It declares that "from and after the first day of May next, all wills or testaments of personal property shall be executed in writing, &c. or else they shall be utterly void and of no effect." It does not say, wills which shall be made after

such a time, for then perhaps it might have excluded those which had been previously executed, though the testator had died afterwards ; but that all shall be void which are not thus executed. It appears as if time was allowed for the purpose of affording an opportunity for those who had made their wills to alter them so as to render them conformable to the provisions of the act ; and would it not appear repugnant to all our notions of consistency that a will executed before the passage of the act should pass properly acquired afterwards, though not executed according to the provisions of it? I think the case of *Houston vs. Houston* not only consistent with the general principles of the law, but with the express letter of the act, and that the motion in this case must be refused.

New Trial Refused.

IN THE MATTER OF THOMAS DRAYTON'S WILL.

The executor of an executor does not represent the first testator unless probate has been taken out on the will of the testator by the first executor. Where the will was proved per testes, and a decision by the ordinary in favor of the will, but the granting of letters of administration suspended by an appeal from the ordinary and in the mean time the executor dies, his executor does not represent the first testator. To constitute probate letters testamentary must be granted on the will.

This was an appeal from the court of ordinary, tried before Mr. Justice *Bay*, at Charleston, October Term, 1826. Thomas Drayton by his last will gave to his son William Henry Drayton, the residue of his estate, and appointed him sole executor. He propounded the will, which was resisted by some of the next of kin and after hearing evidence, the ordinary (Mr. Mitchell,) decided in favor of the will and admitted it to probate. From this decision, the parties, who were opposed to the will appealed and gave the ordinary notice not to grant letters

testamentary to the executor, until the determination of the appeal. He did not make demand of letters testamentary from the ordinary but possessed himself of the assets as far as he could and administered the estate in various ways. At May Term, 1826, the appeal was tried on an issue *devisavit vel non*, and the jury found for the will. The parties who opposed the will appealed and in July 1826, William Henry Drayton died, having made his will and appointed Thomas Wilson Esquire his executor, who proved the said will in due form of law. The appeal was then abandoned and Thomas Wilson made suit to the ordinary to grant him a warrant of appraisal for the effects of Thomas Drayton, and this raised the question whether Thomas Wilson as executor of William Henry Drayton represented Thomas Drayton the first testator, or whether letters of administration *cum testamento annexo* should be granted. The ordinary decided that Wilson did represent the first testator and from this decision the parties opposed to Wilson appealed; and on the hearing of the appeal in October 1826, the presiding judge, Mr. Justice Bay, reversed the decision. From this judgment of reversal, Wilson appealed on the grounds—

1st. That William Henry Drayton did not die before probate; as the probate consisted essentially in the judgment of the ordinary allowing the will.

2nd. That after the appeal, the ordinary had no rightful authority to proceed or administer the executor's oath, and as William Henry died before the appeal was determined, it was impossible for him to take the oath. And as the means appointed by law for completing the probate was rendered impossible by the act of God, he and his executor ought not to be prejudiced by it.

3rd. That the general rule, that if an executor die before probate, administration *cum testamento annexo* must be

granted did not apply to a case like this, where the executor was also the residuary legatee, and had done every thing in his power that was essential to complete his right and assume his duty as an executor.

Petigru, Att. Gen. for the appeal.—If the executor die, before probate his executor cannot prove the will. But in this case the will was proved. William Henry Drayton went to the Ordinary's office with the Will and the Witnesses, and the Ordinary delivered his judgment establishing the Will. The Executor offered to qualify, but the opposite side entered a caveat, which was not granted, and he died. In point of form the probate was not made. But in substance it was. *Probate* is sometimes used to mean the mere proving of the Will, or where the evidence has been taken and the ordinary gives the executor a copy of the will. It is sometimes used to signify the establishing the will, and getting the judgment of the Ordinary that it is the will of the testator. When the Executor sues he only says he proved the will and makes profert. Ordinarily the will is only proved by the oath of the testator. The last act done is administering the oath to the Executor, and that is called probate. It is the authenticating the will and giving a copy to the executor. Toller 58. Now it is contended that as W. H. D. never had a copy of this will, he never had probate. But this was wrong, for before his death he had the judgment of the Ordinary establishing the will. He entremeddled with the estate. He could have sued. To be sure he could not have gone to trial without the probate. If by the act of God, the whole means prescribed to complete an act to vest rights, be not complete, the party shall not be injured if he be guilty of no laches. 1 Coke R. 248, Thomas' edi. Co. Lit. 97c. The Executor here had substantially complied. Besides an appeal suspends the proceedings before the Ordinary. Toll.

73; 6 Coke R. 186, Thomas ed. 4 Leo. 90. *Allen vs. Dundass* 3 T. R. 130. per Buller. If the decree of the Ordinary is reversed, the intermediate acts of the executor are void. Toll. 128, 131. The opposite side prevented the Executor from procuring the requisite formalities of his right. They cannot now object to the want of those forms. So in *Shelly's* case, it has been held that if the substantial part has been complied with, the right is completed. So in case of judgments entered after the death of the defendant. It is said no man can prove a will but the executor named in it. Toll. 114. But Thomas Wilson needs not prove the will. It was proved already *per testes*, by W. H. Drayton. Thomas Wilson needed no probate. It had been done at his hand. Even if letters of administration on the will were granted, no further proof of the will would be required.

COLCOCK, J. But the administrator must swear to the will.

Petigru. That would be necessary if no proof had been offered before the Ordinary. After the evidence of the witnesses, taken by the ordinary, and upon record in the Ordinary's office, and his judgment thereon, it stands as a will, and the administrator need not swear to it. It had already been proved in solemn form. The case resolved itself into this—what has been wanting? Nothing but the oath of W. H. D.—for as to the copy, that was nothing; for it might be obtained now, and probate when granted refers back to the death. On the doctrine of relation, he thought it was not wandering to apply the rule to this case. Toller 75. There was reason why the Ordinary should not grant letters now, as the clerk signs judgment after the death of the defendant. The commission is not the office. *Marbury vs. Madison*, 1 Cranch 137; *Eggleston vs. City Council*, 1 Const. Rep. 45. But suppose that W. H. D. had taken the oath, he

could not swear for his executor. What was that to Thomas Wilson? He has taken the oath as executor of William Henry Drayton, and he stands in his shoes and swears he will do every thing rightfully, as if he were W. H. D. Was it ever heard that a person lost his office, by not taking the oath? It is administered with the delivery of the commission. It was no more essential to W. H. D. than the commission. Suppose the ordinary were to say, I have always considered letters of administration as granted and have them now to deliver? Could your honors say any thing against it? I state the case thus. The ordinary has delivered his judgment and letters of probate now lay in his office for him. It is just the case of *Marbury vs. Madison*. The President in office had made them out in his last days. The officer to carry them, could not take so many and was obliged to leave them, and forsooth the President who succeeded him turned the keys upon them and locked out the messenger, but the commission though never delivered was held good. The accident in this case was precisely within the case of *Shelly*, and was like the case where a deed by accident has not been delivered.

King, contra.—Probate was not only the proving the will, but taking out letters testamentary and until then, no rights are consummated. An action may be commenced, but the plaintiff cannot declare before probate, 3 *McCord* 371. He must set them forth in the declaration. The certificate is required, *Toller* 68. The court knows that in this country the executor proves the will and renounces, and unless he take the oath and gets letters he is no executor. Wills are daily proved and none of the executors qualify, 1 *Salk*. 308, and yet his friends argument would make them all executors and give their executors the rights he is contending for in this case. Proving of the will, of course, is necessary before letters,

2 Swinb. Pow. Ed. 742. Until probate is taken out the party is not executor in any legal sense. In Shelly's case neither party was to receive any benefit. The case of Marbury vs. Madison does not apply. There the commission was made out. The party had taken the oath of office, and every thing else that he could do. To complete an act there must be consent. But the executor being dead, renders it impossible.

Petigru, in reply—Taking the oath was a part of the probate, but the term probate was of loose meaning, and proving the will was the substantial part. That alone was absolutely necessary. The passing of the recovery in Shelly's case exactly illustrated his idea. Thomas Wilson as much represented the testator here, as the heres factus of the civil law. As to the argument of the alien it did not apply. There is no such thing as a half citizen.

THE COURT. Yes, denizen.

King. And my friend has made out half probate.

CURIA, *per* JOHNSON, J.—In this case the court concur in the opinion expressed by the presiding judge and only find it necessary to give in a concise form the reasons on which that concurrence is founded. It is agreed by the counsel on both sides, and the authorities cited at the bar establish clearly that if an executor die before probate, his executor cannot prove or take on himself the execution of the will of the original testator; and with respect to the first ground of the motion, the only question is, whether the will of Thomas Drayton was admitted to probate within the meaning of the rule. In England, from whence this rule is derived, the probate of the will in the common form, consists of the oath of the executor, that the paper propounded is the true last will and testament of the deceased, and that he will truly perform it by paying, first, the testator's debts, then legacies, &c. The

original is then deposited in the registry of the ordinary and a copy thereof is made out under his seal and delivered to the executor with a certificate of its having been proved before him, and such copy and certificate is stiled the probate. Without regard to the formula of making and delivering a copy of the will and the certificate, it will be seen, that three things are necessary to the completion of the probate—1st. Proof of the genuineness of the will by the oath of the executor. 2nd. His acceptance of the trust; and 3rd. The sanction or grant of the ordinary allowing it: and that all these are necessary to probate within the meaning of the rule, will be seen by Toller's Law of Executors, 49. where it is expressly laid down, that if an executor die before probate, he is considered in point of law as intestate with regard to the executorship, although he may have made a will and appointed executors, and although he die *after taking the oath*, if before the passing of the grant. (cited Offi. Ex. Suppl. 74. 5. 182. 11 Vin. Abr. 68. 90.) The will of Thomas Drayton was not, therefore, admitted to probate within the meaning of the English rule, and his executor died intestate as to the administration. But the objection applies still with greater force under the laws of this state, and the state of facts existing in the case. Here the law has superadded, as a pre-requisite, the proof of the will per testes as necessary to the probate, and at this stage of the proceeding, it was arrested by the appeal from the decision of the ordinary and terminated then in the death of the executor, William Henry Drayton, and the subsequent abandonment of the appeal; so that in point of fact, the question whether William Henry Drayton was the executor and entitled to the administration, was never before the ordinary and the time had not arrived when he could accept or renounce it. The probate does not then consist of the judgment of the ordinary allowing the will,

for even after this step, the parties interested would be permitted to contest his right to the administration by shewing that he was not the person named in the will, or that his name was interpolated and the like, or he might himself renounce the administration; and, perhaps, the true rule by which to determine whether an executor transmits to his executor the administration of the first testator's estate, would be best ascertained by enquiring whether the proceedings are in such a state that he can not renounce. That he may do so at any time before probate according to the rule in England, (or to speak with a more direct reference to the state of things existing here,) before he qualifies, is a proposition that none will controvert. Wm. H. Drayton had not qualified as executor of the will of Thomas Drayton, and his executor is not entitled to his administration. 2nd. The appeal from the judgment of the ordinary did, as is supposed, arrest the proceedings in the court of ordinary, and Wm. H. Drayton could not legally qualify pending that appeal, but I apprehend that the maxim, *actus Dei nemini facit injuriam*, has no application to this question. It operates as an excuse for not performing a duty or obligation which from that cause had become impossible, but not, I apprehend, *per se*, to vest a legal right when none before existed. Here Wilson the executor of Wm. H. Drayton does not claim to be excused from the performance of a duty or obligation, but to be invested with a right which had no legal existence.

3rd. The last ground of the motion is rather a matter of argument than a point of law which has been sufficiently noticed in the preceding remarks.

Motion refused.

VICTOR DURAND VS. SAML. T. ISAACKS.

The act of 1791, giving the Court of Common Pleas the power to order the sale of mortgaged premises after judgment, by suggestion, does not apply where the mortgagor is out of possession. In such cases the mortgagee must go into the court of equity and make the mortgagor, as well as the party in possession parties to the foreclosure.

This case was tried at Beaufort in November Term, 1826, before Mr. Justice *Gantt*, who made the following report. "This was a suggestion of mortgage filed after judgment had been obtained on the bond, praying a sale of the mortgaged premises agreeably to the act of 1791. The mortgage was dated 3rd June 1824, and appeared to have been duly recorded and judgment was entered upon the bond 15th May 1826. The order for sale was opposed on the ground that the mortgagor was out of possession of the premises mortgaged; and, therefore, that the mortgagee could not foreclose at law, but must be referred to equity. It appeared by the affidavit of Shubael Laurence, and it was not denied, that the said Laurence was in possession of the mortgaged premises under an absolute conveyance from the defendant Samuel F. Isaacks, bearing date 7th March, 1825, and that he had been in quiet possession from the date of his deed. I was of opinion that the proviso in the second enacting clause of the act, that nothing herein contained shall extend to any "suit or action now pending, or when the mortgagor shall be out of possession," had no relation to the first enacting clause which permits the mortgagee to apply to the court of common pleas for a sale of the lands mortgaged, and that the time when the mortgagor's being out of possession shall prevent the mortgagee's obtaining an order for the sale of the lands mortgaged, must be construed to be the date of the execution of the mortgage. It seemed to me also, that an order for sale would not

affect the rights of third persons who did not claim under the mortgagor subsequent to the mortgage; I, therefore, overruled the objection and granted the order for sale."

From this opinion an appeal was taken up on the ground, that the mortgagor being out of possession, the court of law had not jurisdiction of the case.

Bailey for the motion—cited 1 Faust 65. *Ex parte City Sheriff*, 1 M'Cord 399.

CURIA, *per* NOTT, J.—Previous to the act of 1791, the mortgagee of real estate was considered as having the legal title to the mortgaged property as soon as the time of redemption was passed. The court of equity, however, always considered the property mortgaged in the nature of a pledge only, and would, therefore, allow the mortgagor to redeem within any reasonable time after the pledge was forfeited at law upon his paying up the principal and interest of the debt which it was intended to secure. This right to redeem had become so completely settled that the mortgagee was never considered as having acquired a complete title until the equity of redemption was released by the party himself or foreclosed in the court of equity. The preamble of the act of 1791, recognizes the equity doctrine of considering the land mortgaged only as a pledge for the purpose of securing the payment of the debt. The first enacting clause authorises the court of common pleas in certain cases to order a sale of the land and thereby bar the equity of redemption. The second section provides that no mortgagee shall be entitled to maintain any possessory action for the real estate mortgaged even after the time allotted for the payment of the money is elapsed, but that the mortgagor shall still be deemed the owner of the land, &c. Then comes the proviso which is the subject of the present discussion, and which is in the following words: Provided always that nothing herein contained shall extend to any suit or action

now pending, or where the mortgagor shall be out of possession, &c.” The question is whether this proviso relates to the second section of the act only, or whether it extends to both. When we look to the professed objects of the act, I apprehend that there can be but little doubt that it has reference to all the preceding provisions. The object of the act is to introduce an easier and cheaper mode of foreclosing the equity of redemption than can be afforded by a court of equity. It therefore declares the property mortgaged to be merely a pledge for securing the debt, and that the title shall still continue to be in the mortgagor, even after the time for redemption has elapsed. It then authorises the court of law to order a sale of the land and thereby bar the equity of redemption. The whole subject is so connected that although it is divided into two sections in the act, it appears to be a division in form more than substance. Then comes the exception, “That nothing herein contained shall extend to cases where the mortgagor shall be out of possession, &c.” The reason of the exception is obvious. When the mortgagor is out of possession, the right of some third person must be involved, and according to the forms of proceeding in a common law court, such third person could not be a party; and it would be nugatory to order the sale of a man’s property who was not before the court. For the purchaser would acquire nothing more than a right to bring a possessory action for the land, which is still reserved to the mortgagor by the act. It was intended in such case to leave the party to his remedy in the court of equity, where he might bring all the parties before the court, and by a single operation obtain his money or foreclose the equity of redemption, and to draw from that court only those cases in which the parties could have an ample remedy in a court of law, which could not be had where others than the immediate parties to the contract

were concerned. I am of opinion that this is not one of the cases provided for by the act, and that the remedy is in the court of equity only. The order of the court below for the sale of the property must be reversed.

Order for sale reversed.

DOBSON VS. LAVAL

The act of 1822 makes Protests of Notaries who are dead or reside out of the district where the suit is brought, evidence as well of notice to the endorser as of a demand on the drawer. The Protest should state both the demand and notice of nonpayment, and is evidence of both.

This case was tried at Charleston before Mr. Justice *Gantt*. The only question was, whether by the act of 1822, providing "That whenever a Notary Public, who may have made protest for nonpayment of any inland bill or promissory note, shall be dead, or shall reside out of the district in which said bill or note is sued, his protest of said bill or note shall be received as sufficient evidence of notice in any action by any person whatsoever, against any of the parties to such bill or note," makes the protest of the notary as well evidence of the demand, as of notice to the endorser of nonpayment. His Honor Judge *Gantt* held that the protest was evidence of the demand and notice of nonpayment. The defendant appealed, on the ground that there was no evidence of a demand on the drawer of the note, and that the act only made the protest evidence of notice to the endorser, leaving a demand to be proved as before the passing of the act.

Elfe, for the appellant.

Clarke, contra.

CURIA *per* COLCOCK, J. The defendant's argument is founded on the use of the word "notice" in the act, which it is said in its usual application has relation to the notice

by a legal consequence contained in, or arising out of, the expired lease, the defendant was bound to pay interest on rent in arrear, he is under the same liability with respect to the term for which he held over. In this case, by an express covenant in the expired lease, the rent was payable at the end of the year, and the sum being ascertained and liquidated would carry interest from the time fixed for its payment as a legal consequence, and according to the rule laid down, the plaintiff was entitled to recover interest on the annual balances on account of rent which became due in consequence of his holding over.

Motion granted.

JOHN G. BLEWER Admin. HARRIET BRIGHTMAN, vs. THOMAS BRIGHTMAN, Ex'r. GEORGE BRIGHTMAN.

"I give unto my wife H. B. my two negro female slaves, Sally and Harriet. I also give her one third part of my income annually during her life, to revert after her decease to my estate." Testator then gives to his son Thomas and to his heirs one third of his income. He then gives his daughter the remaining third of his income, for her sole benefit during life, and then to descend to her heirs lawfully begotten. The will then proceeds: "After the decease of my wife, the above named H. B., the whole of my estate to be equally divided between my son Thomas and my daughter Ann, and their heirs lawfully begotten. Held that the wife took an absolute estate in the two slaves.

This was an action of trover for two slaves, Sally and Harriet, tried at Charleston, May 1826, before Mr. Justice Gaillard. The jury found the following special verdict: "We find that George Brightman by his last will and testament in writing, duly executed, gave and disposed as follows: "I, George Brightman of Prince George, Winyaw, being of sound mind, though ill in body, do ordain this my last will and testament, viz.: *I give unto my wife Harriet Brightman my two negro female slaves Sally and Harriet. I also give her one third part of my income annu-*

ally during her natural life, to revert after her decease to my estate. I give and bequeath to my son Thomas Brightman, (of the Parish of St. James, Santee,) and to his heirs one third of my income I give and bequeath to my daughter Ann Moore, (who has married with James Butler, of Abbeville District, in the state aforesaid,) the remaining third of my income, being solely for her benefit and behoof during her natural life, and then to descend to her heirs lawfully begotten. *After the decease of my wife, the above named Harriet Brightman, the whole of my estate to be equally divided between my son Thomas and my daughter Ann Moore, and their heirs lawfully begotten.*" We find that Harriet Brightman survived the testator, and that the executor, the defendant assented, to the legacy of the two slaves. That the said Harriet Brightman died in October 1823, and that the defendant took the two negro slaves into his possession, and converted them to his use as executor, on the 1st February 1825. That the said slaves are of the value of eight hundred dollars. In case the Court should be of opinion that the testator gave the said slaves to the said Harriet Brightman absolutely, then we find for the plaintiff eight hundred dollars, for the value of the said slaves, and one hundred and twelve dollars damages. In case the Court should be of opinion that by the said will Harriet Brightman was entitled to the said slaves for her life only, then we find for defendant."

On this verdict his honor the presiding judge gave judgment for the defendant. From this judgment the plaintiff appealed on the ground that Harriett Brightman took an absolute estate in the negroes.

Petigru, Att'y. Gen. for appellant. Testator must have meant by his "estate" that which he had not previously disposed of, and this appears from his mentioning his estate in the second clause. 1 Fonb. 446. 1 Ves. Jr.

268. Doubtful words ought not to controul what is clear. *Haws vs. Haws*, 3 Atk. 526. *Sims vs. Doughty*, 5 Ves. 243. *Richards vs. Baker*, 2 Ath. 321.

Dawson contra, cited *Barnes vs. Patch*, 8 Ves. 604. *Cole vs. Rawlinson*, 1 Salk. 234. *Leeke vs. Bennet*, 1 Atk. 471. The bequest of the two negroes considered by itself, gave an absolute property in them to Harriet Brightman; but he considered the words in the next clause, "to revert after her decease," as referring to the income, and not to the two negroes, and that the intention was, that the income left by the testator to his son, and that left to his daughter, should they die, his wife being alive, should go to their children. It appeared by the will, that the income of the estate only was disposed of during the life of the wife; for until she died, the estate was not to be divided. The whole of the estate was then to be divided between his son Thomas and his daughter Ann Moore, and their heirs; and the words refer not exclusively to the income—in themselves they purported a more extensive meaning and the testator himself distinguished between the income and the estate; for he uses the expression, "shall revert to my estate."

CURIA per COLCOCK. It is agreed on all hands, that in the first clause of the will, the negroes Sally and Harriet, are given absolutely to the wife; but on the part of the defendant, it is contended that the words of the gift are controlled by those used in the second clause, which restrict the gift therein to the term of her natural life; and also by the use of the words, "the whole of his estate," (in the last clause,) which he directs to be equally divided between his son and daughter after the decease of his wife; and the argument is, that the words in the second clause, "revert after her decease to my estate," must restrict the gift in the first clause to a life estate; first, because the two clauses are to be read as one, being connec-

ted by the word "also;" and secondly, because the restriction in the second clause cannot operate on the subject of the bequest therein given, which is "one third of his income," and, consequently must relate to something else which has gone before; that could not operate on income because it is exhausted in the use and cannot revert; but he must have intended that the negroes should revert after the death of his wife; and in support of this, the case of *Cole and Rawlinston*, Salk. R. 234, and the case of *Leek and Bennett*, 1 Atkins 470, are relied on. But both these views of the case are susceptible of a conclusive answer. As to the first, the two clauses in this will are not connected. They are distinct in their construction, and the testator makes a full stop at the end of the first sentence. It is complete in itself, and the word "also" not being a conjunction cannot join them. It is an adverb and applies to the act of giving, and not to the limitations of the gift as if he had said, I likewise give. Now in the case of *Cole and Rawlinson*, the testator gave both his unexpired term and his house in one sentence, which appears to be the natural course which would be pursued by one intending a restriction or limitation to operate on two things, given in the same will. So in the case of *Leek and Bennett*, the testator gives his house in Greenwich with all the household furniture; and so in the cases therein referred to, of a man who devised Blackacre to one in tail and also white acre; it was held that the devisee took white acre in tail; but both were devises in one clause. And so in some other cases, where from the nature of the articles they are connected—*ejusdem generis* as the Chancellor expresses it. As to the second view, although the income (mentioned in the second clause,) is not a subject on which the words of restriction could operate, yet if we look into the will, even into the next clause, we shall clearly perceive that the testator did not

mean "income" in its literal sense, but meant the property from which the income should be received; for he gives to his son a third of his income to him and his heirs. It would have been as absurd to give the heirs that which might be spent by the father, as to require that which might be spent by the widow to revert after her death. And so in the third clause he gives to his daughter one third of his income during her natural life, and then to descend to her heirs lawfully begotten. But the strong ground relied on, is that the words of the last clause directing his whole estate to be divided at the death of his wife, shews that he only intended her to take a life estate in the the negroes; for the word *estate* embraces the two negroes as well as the rest of his property. Now it is admitted that the word *estate* will cover all a man possesses both real and personal, and consequently is large enough to embrace the negroes given in the first clause. But the question reverts, did the testator so intend. If the latter clause could not stand in perfect accordance with the first, without making the word "estate" embrace the negroes, the rule clearly is that such construction must be given, for a meaning must be given to all parts of the will, if possible. But there is no necessity for this, for all his estate means all that he had not absolutely disposed of in the previous part of his will, and there was enough on which this word could operate. In the second clause, he, for the first time, speaks of his estate, and at that moment he had given the two negroes. They were no longer considered by him as part of his estate which he was about to dispose of during the life of his wife, and which he intended should be divided after her death.— But what is conclusive on the subject is, that the testator knew very well how to create the limitations when he intended to do so; and there is therefore no necessity to seek for his intentions; it would be a violation of one of

the plainest and most forcible rules of construction, never to alter or control that which in itself is clear by that which is doubtful, 3 Atkins 525. The judgment is reversed, and must be entered for the plaintiff.

Judgment Reversed.

JEREMIAH MURDEN ads. H. CLIFFORD.

Where the defendant in a case of usury offered to swear to the circumstances of usury, and for that purpose made a statement of the facts he would swear to, and the plaintiff makes himself a witness under the act, it is not enough that he denies generally the truth of the statement made by the defendant, he must submit to be examined by the defendant in answer to the facts stated by him.

The court thought the best practice would be to require the defendant to make his statement in writing and then to examine the plaintiff in answer to the statement.

This was an action of assumpsit on a promissory note drawn by the defendant, payable to the plaintiff, tried before the Recorder of Charleston, October Term, 1826. The defence was usury. The defendant appeared in court and offered to swear as a witness, under the act of assembly to prove the usury. The plaintiff's counsel objected to his being sworn, and tendered the oath of the plaintiff. The defendant was then called on to state the facts which, if permitted to be sworn, he would depose to; and he related a series of facts in detail which would have made out, under oath, a case of usury. The plaintiff was then sworn and, in limine, was asked by the court whether or not he denied on oath in open court the truth of what the defendant offered to swear in relation to the usury. The plaintiff replied that he did. Upon which the defendant's counsel proposed to put some questions, in detail, to the plaintiff, to be confined to the subject matters contained in the statement made by the defendant to which he had offered to make oath. The court

considered it incompetent for him to do so, on the ground, that as the plaintiff was not a witness, a particular examination of him as to the matters proffered to be sworn to by the defendant, was inadmissible and the plaintiff had a verdict.

This was a motion for a new trial.

Clarke for the motion—Upon all the matters which the defendant stated and offered to be sworn to, the defendant's counsel had a right to examine the plaintiff, for by necessary implication under the usury act, the plaintiff when substituted in place of the defendant is a witness, (the defendant being expressly named as a witness in the act,) and upon all matters which the defendant offered to swear to, the plaintiff might have been particularly examined. It was not in conformity with the spirit and object of the usury act, in cases where the plaintiff will deny on oath in open court the truth of what the defendant offers to swear against him, that the plaintiff's oath should be restricted to one broad and general denial of the truth of all that the defendant offers to swear to. The truth was, that the defendant in his examination of the plaintiff must be confined to, and kept within the statement of facts and all necessary incidents to those facts, which the defendant had offered to swear to, and that within that compass, the defendant's counsel had a right to examine the plaintiff in detail.

Eckhard, contra.

CURIA, *per* NOTT, J.—Whether a contract be usurious or not is frequently a conclusion of law to be drawn from a chain of facts which it belongs exclusively to the court to judge. The method therefore adopted by the recorder in this case to ascertain the facts to which the defendant was willing to depose was proper and correct; and perhaps, if he had been required to put down those facts in writing it would have been better; because then the

plaintiff would have been enabled to have seen distinctly the facts which he was required to admit or deny, and the defendant ought to have been permitted to examine the plaintiff in the same detailed manner in answer to those facts. It was the only way by which the truth could be elicited. The plaintiff may not have recollected all the facts stated by the defendant; he may have mistaken some part of his statement and what is equally probable he may have taken the conclusions which he had drawn from facts for the facts themselves to which he was required to answer; a mistake of which of all others a witness is the most liable to commit. I am of opinion that the defendant ought to have been permitted to have gone into a particular examination of the plaintiff in answer to the facts stated by him and that a new trial must therefore be granted.

New Trial Granted.

JOSEPH GLOVER vs. WM. SIMMONS, JOHN RAMSAY and others, Com. of the Roads.

There were several suits between these parties in which the court decided the following points—

1st. That before the commissioners can fine a defaulter for not working on the roads, they must appoint a day and place and summon him to show cause.

2nd. That a warrant by the commissioners to collect the fines against the defaulter is void if it does not specify the amount of the fines.

3rd. That the commissioners are liable as trespassers for seizing and selling the property of a defaulter, if the above requisites are not complied with.

4th. That the commissioners have no power to compel an individual to work on his own road.

5th. That they have authority over those roads in a parish or district in which there is a right of two or more persons and which are called private paths, as contradistinguished from the public high roads. But that if an individual should gratuitously permit a neighbour to pass through his plantation it will not give a right to the commissioners over such way.

6. That where an issue is made up in prohibition to try the facts in a case of this sort, it is for the purpose of informing the court, 5 Bac. Ab. 661. 2 Sellon 236. 1 Saunders 136, and therefore it is a case for mere nominal damages, and if the jury find more, a new trial will be granted unless the damages be released to one shilling.

Petigru, Atty. Gen. for the plaintiff.

Lance, for the defendants.

WILLIAM LAVAL vs. F. A. DeLISSERLINE.

The City Sheriff of Charleston does not hold his office under the constitutional provision of the State as to the tenure of office of State Sheriffs.

This was a rule taken out by Laval, lately elected city Sheriff of Charleston, against DeLeisserline, the late Sheriff, to shew cause why he had not delivered over the records and papers of the office. The rule was heard by the Recorder of Charleston, October term, 1826, who delivered the following opinion:

The *Recorder*. In this case the objection taken to the rule's being made absolute is, that though the defendant was elected under an ordinance to hold his office for two years only, yet as soon as he became city sheriff he was in under the constitution of the state, the 6th article of which declares that "Sheriffs shall hold their offices for four years." To establish this it became necessary for

the defendant to shew that the constitution includes the city sheriff, and he has attempted this by endeavoring to prove that this court is a state court, that the Recorder is a state judge, and then it is taken for granted that if these positions be demonstrated the city sheriff must be a state sheriff, and consequently included within the provisions of the constitution. For it must be admitted that the officers mentioned in that instrument are state officers, and no others. It is not I apprehend, denied that the city sheriff is a city officer, but it is contended that he is also a state officer, that is, as well a state sheriff as a city sheriff, because he has to perform duties within the city similar to those which the district sheriff performs within the district. That position would seem to flow from such a general principle as this, that whenever a person is directed by law to do certain public duties similar to those performed by a known officer, he thereby becomes such officer; and the defendant's counsel have in conformity contended, that whoever exercises judicial power becomes a judge, and is protected by the constitution. If there were such a principle, the argument perhaps, would be at an end; but none such exists. A coroner exercises an important judicial office, having the authority to summon a jury, and to charge them and receive their verdict like a judge, yet he is not a judge within the constitution, for if he were, though an inferior one, he would hold his commission during good behaviour. He also acts as sheriff when the sheriff is interested, yet no one ever supposed he thereby became protected for four years from such act. So the managers of elections, commissioners of roads, &c. are judges whose decisions are often very important and final, yet it cannot be pretended that their exercise of judicial authority imparted by the laws, gives them a tenure during good behaviour; so with many others. The principle therefore, does not exist. Persons

may be designated to do certain duties similar to those of an officer either executive or judicial, and yet not become thereby such officer. But it is assumed that the character of the court gives the character to the executive officer. No course of reasoning has been pursued to establish this assertion and no authority supports it. In Helfrid's case, Judge Johnson says, "a sheriff is not otherwise necessary to a court than to execute its orders and its process; he certainly has no participation in the judgment of the court; and if there be no sheriff, I see no reason why the court would not be at liberty to pronounce its judgment." But further, when the jurisdiction of the court of Wardens was explained by the act of 1784, the persons designated to serve their process were constables.—In less than three years afterwards, the Wardens themselves by ordinance, established the office of city sheriff, transferring the duties performed by the constables to him. Suppose they had retained the title of constable, and imparted to him all the powers given to the person they called city sheriff, his character it must be admitted, would not have been altered, yet it never would have been contended that such constable became afterwards protected in the tenure of his office by the state constitution as a sheriff. The name then it appears to me has led to the erroneous opinion that the city sheriff is what the law means by a sheriff. Indeed, I doubt the power of the city council to appoint a sheriff. What then, it may be asked, is this office? The answer is, he is a city officer having certain qualifications, and performing in the city certain duties analogous to those of sheriffs. It cannot be denied that the legislature may direct writs to be served by constables or others, and the processes of courts to be executed by whomsoever they think proper. In the present case, within the city of Charleston, they have directed these duties arising out of the city court to be perform-

ed by this officer, as the sheriffs of the state perform those issuing from the superior courts of law. The office is thus declared by the act to be analogous or similar to that of sheriff; but this very similarity destroys its identity; nullum simile, says Lord Coke, est idem. If the city sheriff be a sheriff, then there are two distinct sheriffs, independent of each other, exercising jurisdiction over the same place, which, it is said in 3 Bacon 162, cannot be, for though there are two sheriffs in London and Middlesex, yet they regularly make but one office, and if one die the office is at an end until another is chosen. If in fact the city sheriff be a sheriff in Charleston, what prevents his serving the process of the Common Pleas and Sessions as well as that of the City Court? Further, the city sheriff was an officer well known, as defendant's counsel contended, at the adoption of the constitution in 1790, and therefore was intended to be included in the term sheriff in that instrument; but the reverse appears to me to be the legal conclusion. He was well known then to be an officer of a corporation, of a very mean rank, and as the counsel have admitted, of slender profits. Why should he be drawn from his obscurity and the tenure of his almost worthless office rendered sacred by the constitution? The true construction I take to be this. As sheriffs of the state were at that time officers of dignity and power, and well known, and as the city sheriff, though perhaps equally well known, had neither dignity nor power, the mention of the former is an exclusion of the latter, according to the common maxim, particularly when the very name of the latter is different from that of the former. Further, the constitution carefully preserves all chartered rights and privileges then in existence. (8th art.) The wardens had, (and three years before had exercised it,) the right of electing this officer called a City Sheriff, and of fixing his term of office at their pleasure.

The constitution could not therefore, have intended to include this officer, because it would have abridged a chartered right previously granted by law. But the argument that sheriff must include city sheriff, if good when applied to the constitution, must be at least equally so, when applied to all the acts of assembly, where the term is used. All sheriffs are directed to execute process from the Court of Ordinary, 2 Brev. 223. Can the city sheriff do so? So in many other acts, sheriffs are directed to do certain things which there can be no doubt the city sheriff is not bound to do. Sheriffs are not bound to serve on juries, yet the city sheriff was till the passage of the act of 1796, (2 Faust 101) which says: the following officers of the city of Charleston shall not be bound to serve on juries: the Intendant, City Sheriff, &c. One act directs all public officers to give bond to be approved of by certain state officers, and to be lodged in a particular place, &c. Surely it cannot include the city sheriff or city clerk, or any other city officer. I take the true rule to be, that no act of the legislature applies to this inferior city officer, unless he be expressly named or referred to therein, and I think the same rule is applicable to the constitution. Let the rule be made absolute.

An appeal was now taken up from the decision of the Recorder, as well upon the motion to admit Laval into the office of city sheriff, as upon the rule served on F. A. DeLiesseline to shew cause.

Petigru, Att'y. Gen. for Laval. By the ordinance of 1824 it was ordained that the city sheriff should hold his office until 1826. Under this ordinance DeLiesseline was elected, and after serving as sheriff that period, Laval has been appointed by a new counsel. The constitution of the state does speak of all sheriffs. But it means state sheriffs. This officer is not a sheriff as meant by the constitution. This office grew out of the ordinance

~~passed in~~ pursuance of the act of 1783, P. L. 329, and it is only a city officer. The constitution meant that officer who is known to the common law, and by the act of 1795 P. L. 271, sheriffs are ordered to be elected for each district. These were the sheriffs meant by the constitution. This city officer is not the shire-reeve, the viscount.—Who could confound the sheriff, shire-reeve, or keeper of the county, with the city sheriff of Charleston? They represent different rights. The sheriffs of the state represent the officer who in England holds the court of the shire. The elections of state sheriffs are regulated by acts of the legislature. The city sheriff was never created by that authority. He is the mere creature of the city council. The provision of the constitution does not apply to officers of corporations. City Council vs. Egleston, 1 Con. Rep. 45. City officers are not to be commissioned by the Governor, but by the corporation from whence their appointment emanated. Their duties were different; which was conclusive of the matter. By the act of 1795 the duties of state sheriffs were made the same as in England. Their powers are to raise the posse committatus, they extend over the whole district, they are keepers of the public peace, &c.; Com. Dig. Compt. B. Before the organization of the militia their duty was to call out the troops and to suppress rebellions. Had the city sheriff ever such powers? The city council have not authority to enforce the laws of the state, unless authorized by the legislature. M'Millan vs. City Council, 1 Bay 47. The oath of office only prescribes his duties to the city authorities. He was a constable before the act of 1801, but then the city swelled a little under their new powers, and called him sheriff, but the worthy burgers only changed a name. The case of Helfrid, 2 Nott and M'Cord 233, was not inconsistent with the views he had taken. That case would seem only to say that the Re-

corder, by the acts of the legislature, had two powers, that he was an inferior judge, and as such the constitution was indifferent by whom he was appointed. It can hardly be contended that every bum-baliff concerned in thieftaking, or in catching skulking debtors was to hold his office for four years. If he had been called *baliff*, nobody would have ever thought of his holding under the constitution. The name of Sheriff caused them to catch at this idea of the constitution. The city Marshal stops those who ride too fast, and catches dogs and cattle—he is nothing. But even the city Sheriff, what can he do? He cannot hang a negro. He cannot even serve the process of a magistrate. If your Honors appoint a messenger, he too will be a sheriff, and cry out for the constitution. Has the council been uniform in its plan? Not they. They have some years sunk down to Major Cartwright's plan of annual elections, and then they have become more aristocratical, and have tried the triennial mode. I do think the judgment of the Recorder should be affirmed.

Lance, contra. This office was constituted in 1787, four years before the constitution was framed. He was known as a sheriff and had considerable powers given to him; to make proclamation for the Intendant, &c. and was vested with all the powers given by the state laws to state sheriffs. See Ordinances p. 38, 54, 87. The framers of the constitution must have been aware of this office. The act of the legislature of 1781, recognizes this officer. It legislated for the city sheriff. The same reason applies for the tenure of four years for a city sheriff, as for a district sheriff. The city sheriff has always been a conservator of the peace. Before the act of 1780, the officer who served the processes of the colonial courts was called Provost Marshal. The duties being the same, why should the constitution distinguish between sheriffs of a city and sheriffs of a county. The constitution does apply to a

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class of officers who are not appointed by the legislature, i. e. the recorder, the officers appointed by the governor, &c. If the recorder is considered an officer under the constitution, why not the city sheriff? The Attorney General goes into that court to enforce the laws of the state, and this officer executes them for him.

CURIA, *per* NOTT, J. This court have but few observations to add to the very ample report and opinion of the recorder, containing the grounds and reasons of his decision. And those remarks will apply as well to the cases involving the constitutionality of the authority of the recorder himself as to the case now under consideration. The city of Charleston was incorporated in the year 1783. A city court was then established with power to try all cases arising under the by-laws of the corporation. In the year 1784, the jurisdiction of that court was extended to all cases of a civil nature not exceeding twenty pounds sterling, where the titles to land did not come in question. The city court by their charter of incorporation were authorised to appoint a Recorder, Treasurer, Clerk, &c. and all other officers which should appear to them requisite, &c. By the constitution which was formed in the year 1790, it is declared, that the "rights, privileges, immunities and estates of both civil and religious societies, and of corporate bodies, shall remain as if the constitution of this state had not been altered or amended." In the year 1801, the city court underwent a new organization; but the nature of its jurisdiction was not changed, although it was some what extended. From that period to the present time, the city council have continued to appoint a sheriff, and to regulate the tenure of his office.—The exercise of such an authority for such a length of time the court consider as the highest evidence which they can now have of its constitutionality. In the case of *Steward vs. Laird*, 1 Cranch 299, Judge Patterson who

delivered the opinion of the court said, "another reason for reversal is that the judges of the supreme court have no right to sit as circuit judges, not being appointed as such, or in other words that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has fixed the construction. It is a coterminous interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled: Of course the question is at rest, and ought not now to be disturbed." That reasoning applies with all its force to these cases, because the practice and the acquiescence have been much longer in these cases than in that to which those observations were applied. The motion therefore must be refused.

Rule made absolute.

MARY BOYD vs. JOHN G. LADSON.

The books of the Keeper of a Billiard Table, are not admissible evidence.

The cases, as to the admission of books of accounts in evidence, reviewed and considered.

Tried before the Recorder of the City of Charleston, in January Term, 1826.

The brief states this to have been an action of assumpsit for games of billiards.

The plaintiff offered her original book of entries to prove her account, which the Recorder ruled to be inadmissible testimony and ordered a nonsuit. This was a motion to reverse that decision.

CURIA, per NOTT, J.—We have no act expressly authorizing books of account of any description to be re-

ceived as evidence of the entries which they contain when accompanied with the oath of the party. Our act recognizes a custom as having prevailed of admitting such evidence from necessity and recognizes it as having become law from long usage; and we usually refer to that act for the description of cases in which such evidence is to be admitted. The persons spoken of are merchants, traders, and handicraftsmen; the provisions of the act relate to shop books, merchants accounts, and accounts for work done. In the construction of this act, our courts have extended the rule to other cases where the same necessity exists and which seem to come within the spirit, though not within the letter of the act. It has therefore been extended to millers who saw and sell lumber, *Darby and Farrow*, 1 M'Cord 517, and to a printer for advertising, 1 Nott and M'Cord 186, *Thomas vs. Dyott*. I think that was giving to the law a very liberal construction, and in the case of *Richards vs. Howard*, 2 Do. 474, the court appear somewhat dissatisfied with that decision, and imposed a restriction which goes very far to narrow the effect of it, by requiring the printer to produce his file to shew that the work was actually performed.— In the case of the administrators of *Thomas Lynch ads. E. Petrie*, it was decided that the books of a bricklayer or other mechanic were admissable to prove the performance of a particular job of work in the course of his trade, and articles furnished; but that the articles must be specified, and that a general charge for work and labor was not good. I do not myself very distinctly see the reason of the distinction made in that case; for work and labor may be performed by a person without furnishing materials. However, I think it is a strong case against the present application. In the case of *Fraser vs. Drayton*, 2 Nott and M'Cord 471, it was held that the books of a ferryman were admissable to prove an account of ser-

riage. It will be somewhat difficult, perhaps, to distinguish that case from this. But, I believe, the judges who made that decision, have never been satisfied with it. The keepers of ferries are not in the habit usually of giving credit. It is a privilege which can only be allowed to immediate neighbours; and then they ought to be considered as having trusted to their honour and not to rely on book entries for proof of their accounts, and that observation will apply more strongly to the case now under consideration. It is also very questionable whether the consideration is such as will support a contract. It would be giving encouragement to schools of vice and immorality to suffer such books to be evidence. It is said in the case of *Herlock vs. Riser*, 1 M'Cord 481, that the question cannot be affected by considerations of policy or morality. But that was the case of a shop keeper. It came directly within the purview of the act, and although the charges were principally for whiskey which may be used to a vicious extent, yet there is nothing immoral in the selling of whiskey; and although the privilege may be abused, it cannot alter the nature of the evidence by which the fact is to be proved. The plaintiff in this action is not a shop-keeper, merchant, handicraftsman, or mechanic, nor can the case be brought within the description of any of those in which books of entries have been allowed. The action is not for articles of any kind sold or delivered, services rendered, or for work and labor. And if these books are to be allowed, I do not see why the books of showmen, rope-dancers, and gamblers of every description may not be admitted. I think therefore that the opinion of the Recorder must be supported. Admitting a party to be a witness in his own cause, is under any circumstances a dangerous innovation on the principles of the common law, and ought not to be suffered except in cases of necessity, and then only when

its object is to promote some general good. This case is not one of that description, and the motion therefore must be refused.

Motion refused.

WM. OVERSTREET, & Co. ads. WM. & J. BROWN, & Co.

Although a person cannot give jurisdiction by consent to a court, where it had no jurisdiction before, yet where the court has jurisdiction of the matter, and the party has some privilege which exempts him from the jurisdiction, he may waive the privilege if he chooses.

Where one of two partners reside out of the state, it does not take away jurisdiction of the case from the city court of Charleston; as the act of 1792 provides that where one of two partners is out of the state, the other shall be liable to an action in the same manner as if he were the sole contracting party, which act applies to all courts.

This was an action of assumpsit tried before the recorder of the city of Charleston, in October term, 1826, who made the following report: "This was an action of assumpsit called for trial during the absence of the defendant's counsel from court. The case was clearly proved by the plaintiff, and on the point of jurisdiction a witness testified that the defendant Wm. Overstreet, was a resident of this city but his partner Brown resided in Savannah. No question being made before me on the point, the plaintiffs took their verdict. The next day I received the following notice of appeal—Be pleased to take notice that a motion will be made at the next court of appeals in arrest of judgment or for a new trial, on the ground that the case was not within the jurisdiction of the court, inasmuch as one of the partners of the firm of William Overstreet, & Co. lived in Savannah, without this state."

Rice, for the motion. At common law all the parties to a joint contract must have been made defendants. The act of 1792, 1 Faust 214, authorises suing the partner where

the others were out of the state, does not apply, because it preceded the establishment of this jurisdiction. The act of 1801, 2 Faust 392 ; 3 Brev. 46 ; Act 1818 p. 26 — On looking into these acts it will be seen that they have jurisdiction only when defendant has been resident three months. He cited also, 2 M'Cord 43, on the subject of the jurisdiction. 1 Chitty 313, 427.

CURIA, *per* NOTT, J. The jurisdiction of the city court is limited to cases arising within the city, not exceeding a certain amount, and to persons residing within the city. The subject matter of this case then and the person of the defendant, were subject to the jurisdiction of the court. But it is contended that one partner cannot be sued alone, and that as one partner was without the jurisdiction of the court, the other was entitled to shelter himself under his privilege. Perhaps it might be sufficient in this case to say, the defendant has waived his privilege by submitting to the jurisdiction of the court. For although a person cannot by consent give jurisdiction to a court, where it had no jurisdiction before, yet where the court has jurisdiction of the matter and the party has some privilege which exempts him from the jurisdiction, he may waive that privilege if he chooses to do so. But the act of 1792, 1 Faust 214, has made provision for this very case. Where one of two partners is out of the state, the other is liable to an action in the same manner as if he were the sole contracting party ; and that is not an act applicable to particular persons or courts, but it is a general law equally embracing all. The defendant in this case was therefore liable to this action in the same manner as if he had been a party to a joint and several note. The motion, therefore, is refused.

Motion refused.

OLIVER S. DOBSON VS. RICHARD TEASDALE.

The 7th section of the Prison Bound's Act, which declares that no prisoner shall be discharged "who shall have within three months before his or her confinement, or at any time since, paid or assigned his estate or any part thereof to one creditor in preference to another, or fraudulently sold, conveyed or assigned his estate to defraud his creditors," &c. applies as well to persons applying for the Insolvent Debtor's Act, as to applicants under the Prison Bounds Act.

But the mere fact of paying a debt due to one creditor within the three months will not, of itself, exclude the debtor from the benefit of the act, but such payment must be made with a view to a fraudulent or undue preference of one creditor over the rest.

In this case the defendant applied to the Court of Common Pleas for the benefit of the Insolvent Debtor's Act, and the question made was whether the *seventh* section of the Prison Bounds Act, Grimke P. L. 457, which declares that no prisoner shall be discharged "who shall have within three months before his or her confinement, or at any time since, paid or assigned his estate or any part thereof to one creditor in preference to another, or fraudulently sold, conveyed or assigned his estate to defraud his creditors, &c." applied as well to persons applying for the benefit of the Insolvent Debtor's Act, as to applicants under the Prison Bounds Act. The Reporter could procure no brief of the case, and not being present, does not know by whom the cause was argued.

CURIA, *per* JOHNSON, J.—If the defendant has assigned a part of his estate to one of his creditors, and if even that assignment was intended to give an undue preference to that creditor in fraud of the others, there is nothing in the Insolvent Debtor's Act, Pub. Laws, 247, which for that reason would deprive him of the privileges which it confers; but the 7th section of the Prison Bounds Act does interpose a disability for that cause, and the question in point of law in this case is whether this clause is applicable to cases arising under the Insolvent as well as

the Prison Bounds Act? In the case of Glenn vs. Lopez, Harper's Rep. 107, it is said to be applicable to both, but the authority of that opinion has been questioned on the ground that it is a mere obiter dictum; and for the still further reason, that it is not only the privilege but the duty of the court to review its own decisions, I am disposed to consider the question still open for consideration. It is admitted on all sides, that the Prison Bounds Act was intended in part as a modification of the Insolvent Debtor's Act, and in part as a new system appertaining to the same subject, and according to a well settled rule, both should be read together to arrive at the true interpretation. But how far its provisions were intended to apply to the modification of the insolvent law, to the new system, or to both, jointly, is a question of some difficulty. To entitle a defendant to the benefit of the Insolvent Debtor's Law, the act imposes on him the necessity of surrendering his whole estate, real and personal, to remain confined in the common jail from the time of his arrest, or within ten days thereafter, and to give three months notice for creditors to come in and establish their claims and to contest his right to be discharged, and the effect is to discharge him wholly as well from the demands of all who shall come in and accept the dividend as the suing creditor, and to protect him from the suits of all others for twelve months. The Prison Bounds' system dispenses with the actual confinement, and only requires that the defendant confined on civil process should surrender the whole, or so much of his estate as will satisfy the demand of the creditor at whose suit he is confined, and requires only ten days notice to be given; and the effect is only to discharge him from that particular demand and consequently from his confinement. This analysis clearly shows that the systems established by these several acts are thus far distinct and independent, both as to the

conditions on which the benefits of both are to be obtained and in their effect and operation. But the Prison Bounds Act obviously referring to the rigors of the imprisonment required by the insolvent law, proceeds to enlarge its bounds and limits by extending it to 350 yards in a direct line from the walls of the jail, and in section 2nd permits all persons confined on mesne process to be without the jail on their giving bond and security to the sheriff to remain within the bounds; and the third section provides that all persons confined on execution in any civil case, should be admitted to the bounds on superadding to his bond the further condition that he will within forty days render to the clerk of the court a schedule of his whole estate, or so much thereof as will satisfy the demand of the plaintiff at whose suit he is confined. That this section, the third, was intended as a modification of the Insolvent Debtors' Act, as well as a part of the system contemplated by the act to which it belongs, is, I think, most apparent. Without it, there is no provision that a prisoner in execution and who intends to apply for the benefit of the insolvent law shall be entitled to the prison bounds. If confined on mesne process, he might give bail, and thus the boasted humanity of the act would be wholly defeated. But their connection does not depend on this circumstance alone; the 6th section provides expressly that any person confined on mesne process or "on execution (provided the person on execution has not been in actual confinement above forty days,) be determined to deliver up all his or her estate and effects, and to take the benefit of the act for the more effectual relief of insolvent debtors, he or she shall have the benefit of the said act, although he or she may have given bail to the action or not surrendered him or herself within ten days after the arrest, or not presented a petition within forty days after confinement, or not been actually confin-

ed three months, provided he or she comply with the other provisions of the said act," &c. Thus evidently in the spirit of the act, substituting the more humane prison bounds for the more rigorous confinement in the walls of the jail required by the insolvent law. Then follows the 7th section, out of which the present question arises. It is in these words, to wit, "any prisoner committed on execution aforesaid, who shall not give in such schedule agreeably to the tenor of his or her bond shall not be any longer entitled to the benefit of the prison rules, but his bond shall be forfeited and assigned to the plaintiff, nor shall any prisoner be discharged without satisfying the action or execution on which he or she is confined, if since his or her confinement and before, he or she gave security as aforesaid, he or she has been seen without the prison rules without being legally authorised so to do," &c. "or who shall have within three months before his or her confinement, or at any time since paid or assigned his or her estate, or any part thereof to one creditor in preference to another, or fraudulently sold, conveyed or assigned the same to defraud his creditors." &c. The word execution as used in the sixth section is applied expressly to the insolvent law only, and as the last antecedent to the words "execution aforesaid," in the beginning of the 7th section, must according to grammatical rule be construed in reference to it, and consequently all the provisions of this clause. But I am unwilling to put the subject upon such a subtilty, and will rest it on what, I think, is evidently the spirit and meaning of the act. I have shown already that the Prison Bounds Act intended to substitute the prison bounds for confinement in jail, and that no one confined on execution, whether he intended to apply for the benefit of one or the other of these acts, can be admitted to the bounds without giving the bond required by the 3rd sec.

tion of the Prison Bounds Act. What then becomes of the provisions in the 7th section that the bond shall be forfeited and assigned to plaintiff, if the defendant neglect to render his schedule, and that he shall be excluded from the benefit of the act, if, since his confinement, he has been seen without the prison rules, or prefers one creditor to another? The result would be that the bond would impose no obligation on such as intended to apply for the benefit of the insolvent act. Unless this clause is retained as a part of that system, he might render in his schedule, or go without the prison rules at pleasure and give any preference to one creditor over another however fraudulent and no consequences would follow. The provision in this section that no prisoner shall be discharged without fully satisfying the execution on which he or she shall be confined, if they shall violate its provisions, have been relied on as having a particular and especial relation to the prison bounds system, which contemplates only the payment of the particular debt for which he is confined, and hence it is concluded that so are all its provisions. This is, however, attaching to it more importance than it imports in itself and clearly more than was contemplated by the framers of the law. If a prisoner pays the debt on which he is confined, his discharge follows of course, whether he applied for the benefit of the insolvent or prison bounds act, for the obvious reason that there would be no authority for detaining him in custody, and the same consequences would have followed, if this provision had been omitted. The disabilities interposed by the clause deprive him of the benefit of both of the acts, and his discharge on the payment of the execution on which he is confined is not by their operation, and consequently does not entitle him to the protection which they afford. In other words, he is excluded from the benefit of both and is left to purchase his liberty precisely in the same

terms as if they had never been passed. Again—is there any reason for interposing greater difficulties in the way of him who applies for the benefit of the prison bounds act than he who claims the benefit of the insolvent act? The consequences of the latter are more inimical to the interest of the creditors. It is more beneficial to the prisoner, because if he pays only five shillings in the pound, he is discharged not only from the demand of the suing creditor but from the demands of all others who think proper to come in and accept a dividend, and he is left to begin the world anew. Whereas in the former a single creditor only is interested and any proceedings under the prison bounds act could only have the effect of discharging him from that particular demand. I come, therefore, to the conclusion that the seventh clause of the prison bounds act is not only according to grammatical construction, but according to the spirit and meaning applicable to the modification of the insolvent act as well as to the former, and must be retained as necessary to the operation and perfection of the system. In the construction of this clause, it was held by the court at the last sitting at Columbia in the case of *Creyton and Sloan vs. Dickerson*, 3 M'Cord 438. (a) that the fact of paying a debt due to one creditor within three months before the confinement of the defendant did not of itself exclude him from the benefit of the prison bounds act, but that such payment must have been made with a view to a fraudulent preference of that creditor, or in the terms of the act itself an undue preference; and the correctness of that decision will be apparent to any one who reflects that insolvency may and does frequently overtake persons, particularly in trade, so suddenly as to render it impossible to guard against it. This case was decided in the court below on the ground of law alone and without regard to the character

(a) See also *Stover vs. Duren*, 2 M'Cord 266.

of the transaction, it must therefore be sent back to be tried upon the principles of the rule laid down.

COLCOCK, J. concurred with Mr. Justice *Johnson*.

NORR, J. dissenting. I differ in opinion with my brethren in the construction of the acts now under consideration. I think that the seventh section of the prison bounds act relates exclusively to that act, and that it has no application to the act for the relief of insolvent debtors. The object, provisions, and mode of proceeding under the two acts are different, and the whole ambiguity arises from having introduced into the prison bounds act one section, (the 6th) which relates exclusively to the insolvent debtors act. Let us suppose that clause to be stricken out, or to be enclosed in a parenthesis, or even let the sixth and seventh sections be transposed, and the whole difficulty will be removed. Previous to the passing of the prison bounds act, a person in execution was bound to remain three months within the four walls of the gaol before he could be liberated. The object of the sixth section was to allow persons who had the benefit of the prison rules the same right to the act for the relief of insolvent debtors as was allowed by persons in actual confinement. It was intended to relieve them from actual confinement during the time required for them to give notice to their creditors of their intention to apply for the benefit of the act. Let a person then wishing to take the benefit of the prison bounds act only, lay his hand upon the sixth section until he reads the other parts of the act through, and he will meet with no difficulty in understanding it. If he wishes to take the benefit of the insolvent debtor's act, he must look to the provisions of that act, and not to those of the prison bounds act. To be sure, if he would have the benefit of the prison rules, he must comply with the requisites which entitle him to those rules; that is to say, he must comply with the condition

of his bond, which, if he fails to do, he will lose the benefit of the prison rules : but he does not forfeit his right to the benefit of the insolvent debtor's act ; he only subjects himself to the inconvenience of remaining three months within the prison walls before he can have the benefit of it.— Such I believe, has been the uniform construction hitherto given to the act ; at least such has been the invariable practice under it, which of itself furnishes pretty high evidence of the legal construction. It is true, we sometimes differ in opinion with regard to the practice under some of our oldest statutes ; but the daily practice of assigning property to some creditors in preference to others, an instance of which we have just witnessed in the case of M'Dowall & Black ads. Moffat and others, (a) furnishes satisfactory evidence of the practice in this instance. This decision, therefore, will produce an entire revolution in a practice which has prevailed in this state from time immemorial. It will have the effect to put an end to such assignments. For any creditor who is dissatisfied with the terms of the assignment has nothing to do but to arrest the debtor and he may subject him to perpetual imprisonment, if he has given any preference. I think, therefore, the motion ought to be refused.

Motion granted.

(a) 1 M'Cord's Ch. R. 434.

LAW CASES

ARGUED AND DETERMINED IN

THE COURT OF APPEALS,

OF

SOUTH CAROLINA,

IN

JANUARY TERM, COLUMBIA, 1827.

JUDGES PRESENT.

HON. ABRAHAM NOTT, *Presiding Judge.*

HON. C. J. COLCOCK,

HON. DAVID JOHNSON.

BANK OF THE STATE OF SOUTH CAROLINA VS. WALTER
HERBERT.

O. and T. as drawers, and defendant as indorser gave G. a power of attorney to make the *renewals* of a note they had discounted at bank. On a suit by the bank against the defendant, as the indorser on a renewal made by G. the bank must show that the note sued on is the renewal of some original note drawn by these parties.

A power to renew a note at 60 or 90 days, will authorise the renewal of the note at 88 days, there being no violation of the object and intention of the parties.

Assumpsit on a note drawn by Samuel Green as attorney for John O'Neill, and Thomas S. Barrett, at eighty

eight days, for \$200, and endorsed by Saml. Green, as attorney for Walter Herbert. The questions were, Whether a power of attorney to Dr. Green to renew a note which these parties had discounted at the bank, with O'Neill and Thomas as drawers and Herbert endorser, "at sixty and ninety days," authorised his renewing the note at eighty eight days? And

Whether the bank was not bound to show that the note sued on, was a renewal of the note which O'Neill, Thomas and the defendant had in the bank, at the time Green was authorised to renew?

The power of attorney was dated in September 1818, and the note sued on dated the 14th Nov. 1823, and protested on the 13th Feb. 1824.

O'Neill and Johnston for the appeal.

Jeter, Sol. contra.

CURIA, *per* JOHNSON, J.—The power of attorney to Green did not authorise him to draw and indorse an original note in the names of the parties, but to draw and indorse renewals of a note which had been discounted at the bank. They are not bound by the acts of their attorney further than as he acted within the power granted. It was, therefore, incumbent on the plaintiff to have shown that the note sued on was a renewal of some original note drawn by them. The plaintiffs might have been misled by the opinion of the court, that this evidence was not necessary, and for that reason the court will order a new trial, instead of granting the motion for a non-suit, when the facts may be proved, if they exist.

The other ground presents the question whether the power granted to Green by the defendant to renew notes payable "*at sixty or ninety days*," included the power to endorse a note at *eighty eight days*?

In the construction of powers as well as all other instruments the object and intention of the parties to be

collected from the terms used, taken in connexion with the subject to which they relate, must always prevail; and if we look to the only object which the parties to this power could have had in view in imposing this limitation on the powers of their agent, it is scarcely possible to misconceive their intention.

The limitation to sixty days, as the shortest period, could have had for its object nothing else than to protect the drawer from a sudden and unexpected demand at the caprice of his attorney. And so the limitation of ninety days could have been intended only to guard the indorsers against the consequences of an extended credit and the possible insolvency of the drawer. Any day between these periods affords a sufficient security against all the dangers intended to be guarded against, and is therefore within the intention and meaning of the parties, and the authority to Green authorised his drawing the note in question. The motion cannot therefore prevail on this ground, but a new trial is ordered on the first.

New trial granted.

ADAM EDGAR, ADM. of WILLIAM M'KENZIE, ads.

JAMES BROWN.

Plaintiff gave in evidence a Bond purporting to have been executed in another state, and proved the signatures of the obligor, but gave no evidence as to the signatures of the witnesses.— Held to be sufficient evidence of the execution of the Bond, under the act of 1802.

This was an action of debt on a bond executed in Delaware, to which there were two subscribing witnesses. The plaintiff proved the handwriting of the obligor, but offered no evidence whatever of the handwriting of either of the witnesses. Upon this ground the defendant moved for a nonsuit, which the presiding judge refused,

and suffered the bond to go to the jury. The jury found for the plaintiff, and the defendant appealed.

Gregg, for the appeal, cited *Plunkett vs. Bowman*, 2 M'Cord's Rep. 144.

Preston, contra, 2 Bay 507; 1 Brev. 319.

CURIA, *per* JOHNSON. The Bond on which this action was brought was executed in the state of Delaware, where the witnesses are supposed to have resided, and I am strongly inclined to the conclusion that the evidence was admissible on the principles of the common law, as the best which the nature of the case admitted of, and which was in the power of the plaintiff to produce; but the act of 1802, 1 Brev. 219; par. 16, supercedes the necessity of investigating the principle. That act provides that "the absence of a witness to any bond or note shall not be deemed a good cause by any court of justice for postponing a trial respecting the same; but that the signature of such bond or note may be proved by other testimony, unless the defendant at the time of filing his or her plea shall swear or affirm, according to the form of his religious profession, that the signature of the bond or note in suit is not his or hers," &c.

That the object of the act was to dispense with the strict common law mode of proof and to substitute a greater facility in its place, and that the substitute proposed was proof of the signature of the obligor, is I think, very apparent from the phraseology of the act itself. And such has been the universally received construction and practice upon it. For when the signature of the obligor of a bond or the maker of a note is generally well known and the proof of it conveniently practicable, it is rather a rare occurrence to summon the subscribing witnesses.—A contrary construction so far from furnishing the facilities contemplated by the act would create additional embarrassments by making the proof of the handwriting of

the witnesses also necessary, which although it might occasionally be practicable, would generally be more inconvenient than to procure his attendance.

The case of *Plunkett vs. Bowman*, 2 M'Cord 144, cited in support of the motion, does not conflict with this conclusion. The argument of the court in that case proceeds on the common law rule, and it is obvious that the provisions of this act were entirely overlooked.

New Trial Refused.

JOHN W. LINDSAY, ads. JOHN JAMISON, Adm'r.

Where the Plaintiff, an Administrator, charges in his declaration a promise to his intestate, and the statute of limitations is pleaded, replication that within four years, defendant promised intestate, and since his death the administrator; demurrer supported to so much as replied a promise to the administrator, as a departure from the declaration; but new trial granted to plaintiff with leave to add a count, to meet the justice of the case.

The replication must not depart from the allegations made in the declaration in any material matter.

Motion for nonsuit refused, because the case was proved as stated upon the record, though that was defective.

"I have paid the money, but if I cannot shew that I have paid it, I will not plead the statute," is sufficient to take a case out of the statute of limitations.

This was an action of assumpsit brought by the plaintiff as administrator of Hugh Wallace, deceased, upon a note of hand given by the defendant to the deceased, and tried before judge Waties, at Newberry, March, 1826. The plaintiff charged in his declaration a promise to his intestate only. The defendant pleaded the general issue and the statute of limitations. Upon the plea of the general issue, issue was joined, and to the plea of the statute of limitations the plaintiff replied a subsequent promise to his testator within four years, and also to the administrator since the death of the intestate within four years, and demurred to that part of the replication which alleg-

ed a promise to the administrator within four years, on the ground that it was a departure from the case made in the declaration, inasmuch as there was no count on a promise to the administrator.

The testimony adduced to take the case out of the statute was a promise to the administrator. There was no testimony to support the issue joined upon a promise to the intestate.

The judge overruled the demurrer, holding that the issue joined upon a promise to the intestate, was supported by proving a promise to the administrator. The acknowledgment of the debt was insubstance as follows : "I have paid the money, but if I cannot show that I have paid it, I will not plead the statute."

The defendant appealed, and moved to reverse the decision on the demurrer, and for a nonsuit.

Nance, for the appeal. The judgment should be reversed, for the second part of the replication was a departure from the case made in the declaration, inasmuch as there was no count in the declaration on a promise to the administrator. For a nonsuit, he urged that there was no other evidence upon the issue tendered to the country upon a promise to the intestate within four years, other than the promise which was proved to have been made to the administrator, which was clearly inadmissible, and not evidence to support the count in the replication or in the declaration upon a promise to the intestate ; and that it was not sufficient to take the case out of the statute.

CURIA, per JOHNSON, J. The settled rule is that the replication must not depart from the allegations set out in the declaration in any material matter, and the reason given for it is, that if parties were permitted to wander from fact to fact, and to supply a new cause of action as often as the defendant should interpose a legal bar to that which the plaintiff first set out, it would lead to endless

prolixity, and it would even be possible by this means to prevent them from ever coming to issue. Without inquiring for a further illustration of the rule, it will be sufficient to remark, that it has been frequently applied to the precise question under consideration, and it has been repeatedly decided that such a replication is a departure. 1 Chitty Pl. 618-9 ; 2 Ld. Ray. 1101 ; 6 Mad. 309 ; 1 Salk. 28 ; 3 East. 409 ; 5 Binney 576. The demurrer ought therefore to have been sustained. It would appear from the evidence however, that the merits of the case is with the plaintiff, and for that reason the court will order a new trial, and give the plaintiff leave to amend his declaration by adding a count on the promise made to the plaintiff as administrator.

As the case stood on the record in the court below, it was literally proved on the trial, and for that reason the motion for a nonsuit cannot prevail. But connected with this ground the question arises, whether the declaration of the defendant, "I have paid the money, but if I cannot show that I have paid it, I will not plead the statute," would be sufficient under a proper state of the pleadings to take the case out of the statute of limitations?

The cases on this subject have all been collected in the case of *Burden vs. M'Elhanney*, 2 Nott & M'Cord 60 ; from which it appears, that if there is any acknowledgment of a subsisting debt, or admission that the accounts between the parties are unsettled, it will be sufficient to take the case out of the statute. The case of *Freeman vs. Fenton*, Cooper 584, bears a striking resemblance to the present case: "then prove your debt and I will pay it;" "I am ready to account, but nothing is due," were held sufficient. In this case the declaration "I have paid the money," would unconnected with the subsequent words, seem to exclude the idea of the acknowledgment of a subsisting debt or a promise to pay, but connected with the

concluding words of the sentence it is evidently put on the footing to pay if he failed to prove the payment. It was therefore a promise to pay on that condition, and having failed to prove it the liability attached.

New trial granted, and leave given to plaintiff to amend his declaration by adding a count.

THOMAS TAYLOR VS. WADE HAMPTON.

Every privilege which one man claims in derogation of the rights of another, is viewed with jealousy by the law, and it will require it to be confined to the prescribed limits and specific objects of the grant.

When a person claims the right of keeping up a pond of water which overflows the land of another, it must be kept at its prescribed limits, which are, the height to which it was kept at the time of the purchase, and for the specific object to which it was then applied.

By the extinguishment of a right is meant its total annihilation, and not its suspension.

The right to overflow the lands of another by grant or prescription is an incorporeal hereditament, and if extinguished for a moment is gone forever.

— Rights of this sort are denominated by the civil law *servitudes*.

A servitude may be extinguished by the act of God, the operation of law, or by the act of the party.

The act of a party shall always be construed most strongly against himself.

A servitude may be extinguished by a renunciation of the party, either *express* or *implied*, as by permitting the party from whom the servitude is due, to build on the property such works as presuppose an abandonment of the right.

When the act which prevents the servitude, is by the party to whom the servitude is due, it is wholly extinguished, but when it is by the act of another, it is only suspended.

An act incompatible with the nature or exercise of the servitude is sufficient to extinguish it: so the creation of a new inconsistent right by the party himself, will extinguish the former right.

This was an action brought against the defendant for overflowing the plaintiff's land, tried at Columbia, Nov. 1826. It appeared in evidence that previous to the year 1807, Mr. Charles Pinckney owned the two tracts of land now claimed by the plaintiff and defendant. In the year

1807 he sold to the defendant the part now claimed by him. There was on the land at the time of the sale a Mill Pond, Dam and Mill in full operation. The deed conveys the land with all the *rights, members and appurtenances* thereunto belonging, without particularly specifying the mill. A plat of survey designating the metes and bounds of the land was annexed, and referred to in the deed, on which was written the word "mill," as representing the place where the mill stood; and the deed and plat both represented a great part of the land (115 acres) as covered with water. The mill was kept in operation until the year 1814, when a new mill called the Merchant Mill was erected above the one purchased from Mr. Pinckney, but on the same creek, and on a part of the land previously covered by the pond. When the new mill was erected, a dam was thrown across the creek above, so as to obstruct the water and divert the stream into artificial canals, one for the purpose of supplying the upper mill and the other for the mill below. The lower mill could not be kept in operation by the water through the natural channel of the creek, because it threw the water back on the wheel of the upper mill, so that it would not work, the mill then standing in the pond. When the upper mill was first erected the lower dam was cut to let the water off, but was immediately rebuilt. The flood gates were still kept up, but the water in the pond was never raised except occasionally for the purpose of flowing rice, until the year 1823. The new mill having been burnt, the lower mill was then repaired, and the water restored to its natural channel. The pond being raised for the purpose of keeping the mill in operation occasioned the reflux of the water upon the plaintiff's land, which was the trespass complained of. The plaintiff purchased of Mr. Pinckney in the year 1807.

The jury found a verdict for the plaintiff on the ground that the water had been raised two feet higher since the rebuilding of the mill in the year 1823, than it was in the year 1807, when the defendant purchased.

The defendant moved for a new trial, on the grounds,

1. That the verdict was not supported by the evidence.
2. That the defendant had a prescriptive right to raise the waters of Doctor's creek to as great a height as the water was raised at Pinckney's mill when the injury complained of ensued.

3. That the defendant did not raise the water of Gills creek two feet higher than the extent to which it had been raised by Charles Pinckney before his purchase.

W. F. DeSaussure, for the motion. As to the legal effect of the deed from Pinckney to Hampton cited, 2 Blac. Com. 16. 2 Viner 598. *Nicholas vs. Chamberlin*, Cro. Jac. 121. 2 Caines 87, 104. 2 Bac. Cov. F. 77. Under a general grant the purchaser acquires all the rights and privileges that the grantor had and is subject to all the liabilities which the tenancy imposes. As to the abandonment of the right—the flowing of the land in 1816, 1817, and 1818, for the cultivation of rice, was sufficient to put the plaintiff on his guard. There was a difference between presumptions giving and defeating rights. 1 Cowper 216. *Beaty vs. Shaw*, 6 East 215. *White vs. Crawford*, 10 Mass. 189. Domat 200.

Preston, contra. An easement is against common right, and the genius of the law is opposed to it. Co. Lit. 147. 1 Dom. 207, 208. 1 Salk. 170. Cro. Eliz. 300. 1 Dom. 217, tit 12, par 6. 2 T. R. 81. Angel on Water Courses, 67, 69, Appendix 74. *Hatch vs. Dwight*, Angel app. 180. 1 Heineccius 137, 247. 1 Code Napoleon p. 647, par. 703. 3 Do. 151. Domat 480. *Tarrant vs. Terry*, 1 Bay 238. 2 Atk. 83. Coop. Just. 618. 1 Esp. R. 364.

Dig. L. 8, tit. 6. 4 Co, R. 87. Cro. Jac. 170. 3 Salk. 46. Yelverton 159. 7 Mass. 6.

Harper, same side, cited Angel Wat. Courses 41. 2 Saund. 175. Co. Lit. 172, 121^b, 49. 2 Selw. 1252. 1 Roll. 935. Polly vs. Thompson, 1 Bos. vs. Pul. 371, a leading case. 1 Lev. 131. Cro. Car. 57. Co. Lit. 56. 1 Saund. 323, note 6. 6 Coke 63, Sir Moile's case. Hob. 108, 235. Willes 332. Vaughan 261.

Gregg, in reply, cited Platt vs. Root, 15 Johnson 218. Louisiana Code 404, 406. 4 Com. Dig. Grant 11.—Pickering v. Stafler 5 Sargt. and Raw. Com. Dig.—Grant E9. 3 Bac. Ab. tit. Grant. 15 Johns. 454. Yelverton 159, note. As to the question of abandonment he cited 2 Poth. on Con. 133. 3 Dane's Ab. 45, tit. Nuisance. Ib. 275, tit. Ways. 10 Mass. 183, 379. 3 Starkie on Evid. 1215, note (e). Angel 39, 41, 49. Louisiana Code 1066, tit. occupancy. Ib. 240, 248. Co. Nap. Sec. 704. Louis. Code. 256, art. 812. Ib. 240, art. 765.

CURIA, *per* NOTT, J.—If the event of this motion depended alone on the ground taken for a new trial this court would not interfere with the verdict. There was a great deal of conflicting evidence of which it was the province of the jury to judge and the court is not dissatisfied with the result. But in the course of the investigation two other questions have been submitted to the consideration of the court.

1st. Whether by the terms of the deed the mill was conveyed to the defendant in the character or with the qualities of a *mill* so as to give him a right to keep up the pond to the injury of Mr. Pinckney of whom he bought, and of the present plaintiff who purchased from him.

2nd. If it was, whether the erection of the upper mill, the existence and enjoyment of which being incompatible with the use of the other, by means of this pond, did not amount to an extinguishment of that right? These

questions are equally new and important to the people of this country. They have been very ably and learnedly argued by the council on both sides. And if they are not correctly decided it will be on account of their intrinsic difficulty and not because they have not received all the light of which they are susceptible.

On the first ground it has been contended, that the defendant has purchased the *land only*, "with the rights, members and appurtenances thereunto belonging." That the pond is not an appurtenance of the *land*. If it is appurtenant to any thing it must be to the mill, and could not pass without an express grant of the thing to which it is appurtenant. And as the mill is not specifically conveyed, it passes only under the general description of land and not as a mill and therefore carries with it none of the appurtenances of a mill. This is a question of no inconsiderable importance in this state where the usual mode of conveyance is very short and simple. But as I have formed my opinion on the second ground I shall not go into a consideration of it at present.

I will pass on to the consideration of the question whether the defendant has not, by the erection of the new mill and the means connected with it, extinguished the right which he had of keeping up such a head of water as to overflow the plaintiff's land?

In considering this question it must be assumed that the defendant had a right to keep up the water to the height to which it was raised at the time he purchased, even though the consequences were the overflowing of the plaintiff's land. I would nevertheless observe that every privilege of this sort which one man claims in derogation of the rights of another is viewed with jealousy by the law, and as an object not highly entitled to its favour. It will require, therefore, that it be confined to the prescribed limits and specific objects of the grant.

The privilege contended for is the right of keeping up a pond. The prescribed limits are the height to which it was kept at the time of the purchase, and the specific object that to which it was then applied; to wit, the support of the mill. The present object of our enquiry however is not whether General Hampton is still entitled to the enjoyment of that privilege, but whether that right has not become extinguished by subsequent circumstances. In the prosecution of that enquiry, I shall make use of the word "*extinguishment*" as being in my opinion the best calculated to convey the idea I mean to express. It is also to be understood that I mean by that word an entire annihilation or destruction, and not a mere suspension, of the right. And I shall endeavor to show that a right of this sort (that is, an incorporeal hereditament,) once extinguished is forever gone and cannot revive. That an extinguishment therefore for one moment is an extinguishment forever.

Rights of this sort are denominated by the civil law "*servitudes*" which is construed "*servitudes or services*," for I observe that it has received both constructions. It is a subject therefore on which we shall receive no little instruction from that source. For although the common law is the law of this state, and it is by the rules of the common law that this case is to be governed, yet the civil law may be resorted to by way of illustration. I will therefore first commence with the common law, and will then show that the principles there laid down, are equally well supported by the civil law.

The word "*extinct*" Lord Coke says cometh from the verb *extinguere* to destroy or put out, Co. Litt. 147-6. In Bacon it is said whenever a right or interest is destroyed or taken away by the act of God, operation of law or act of the party, this in many books, is called *extinguishment*, 3 Bacon Tit. Extinguishment. See also Terms de

la Ley and Jacob's Law Dictionary under the same title, where a great number of cases are put, to shew the distinction between the extinguishment and the suspension of a right. And here it may be remarked, that an extinguishment may be either by the act of God, operation of law, or the *act of the party*. And so rigid is the law, that the act of the party will effect an extinguishment of a right where the act of God or of the law will only cause a suspension of it. And for the most obvious reason. The act of a party shall always be construed most strongly against himself, but he shall not be injured by an act of God or of the law. The same distinction is made in the civil law. In the Code of Louisiana 246, after mentioning the various methods by which servitudes may be *extinguished*, it is said, that servitudes are *extinguished* when the things are in such a situation that they can no longer be used and when they remain perpetually in that situation. But if the things are re-established in such a manner that they may be used the servitude will only have been *suspended*." And in page 256, it is said, a servitude may be extinguished, by a renunciation of the party either *express or implied*; as permitting the party from whom the servitude is due to build a *wall* or *house*, &c.

The distinction between an extinguishment and suspension is very well illustrated by the two cases put by Domat, Lib. 1. Sec. 6. fo. 207. Tit. Services. If the proprietor of the land or tenement for which the service was established acquired the property of the land or tenement which serves, and afterwards sells it again, without reserving the service, it is sold free; for the service was annulled and is not re-established to the prejudice of the new purchaser.

But if between the land or tenement which serves and that to which the service is due there be another land or

tenement which hinders the use of the service, the service is suspended only while the obstacle remains. Here it is seen, that when the act, which prevents the service, is by the party himself, to whom the service is due, it is wholly extinguished. But when by another it is only suspended; because it was not his fault or neglect that it was not demanded. And that distinction will be found to run through all the books.

Let us now see what act of the party will amount to a renunciation or extinguishment of his right. That has indeed been shewn to a considerable extent by the cases which have been already adduced. But I will endeavor to show that it is a general principle both of the common and civil law, that any right may be destroyed, not only by an act of the party positively destructive of the right itself, but by an act incompatible with the nature or exercise of it. Thus, for instance, by the old common law the giving a bond for the payment of money by a master to his servant or villain, or bringing an action against him amounted to a manumission or extinguishment of his right of service, because such acts were inconsistent with the relation of master and servant, 2 Blk. Com. 92. By the civil law even admitting the servant to set at the masters table amounted to a manumission, 1 Brown Civil Law 109. If one holding an office accept another inconsistent with it, even though it be an inferior one, it will be an extinguishment of the other, Millwood vs. Thatcher, 2 Term Rep. 81. By the marriage of an obligor with an obligee the debt is extinguished, 3 Bacon 107, Tit. Extinguishment. If any one stands by and see another build on his land without interposing his claim his right is extinguished, Tarrant vs. Terry, 1 Bay 240. East India Company vs. Vincent, 2 Atk. 83. So if a person have a right of way from one close to another and he grant the close to different persons his right is destroyed, Dill vs.

Balshorpe, Cro. Eliz. 300. All these cases, and many more which might be added if necessary, go to establish the general principle that two inconsistent rights can not exist together, and that the creation of a new and inconsistent right by the party himself, is an extinguishment of a former one. And having established the general principle it only remains to shew by particular cases the application of those principles to the case now under consideration. In 2 Jacob's L. D. 448. Tit. Extinguishment, it is said, A. has a stream of water which runs through a leaden pipe, if B. purchase the land and destroy the pipe, the water course is extinct, because by this he declares his *intent and purpose that he will not enjoy them together*. So a way is extinguished by unity and is not revived by severance, for which Bulstrode is cited. See also 1 B. & P. 373, Whaley vs. Thompson.

In the Louisiana Code it is said, "servitudes are extinguished by *renunciation or voluntary* release of them by the owner of estate to whom they are due. This renunciation may be express or tacit. The release of the servitude is tacit when the owner of the estate to which it is due permits the owner of the estate charged with the servitude to build on it such works as presuppose *an annihilation* of the right," 246, 258. From this authority it appears that two things are necessary to effect the object, 1. That the works constructed be of a permanent solid kind, such as "a wall or edifice." 2. That they present an absolute obstacle to every kind of exercise of the servitude. Now the case put by way of illustration is, "when the owner of the Estate to which the servitude is due permits the owner of the estate charged with the servitude to build," &c. But it will equally follow, and still more strongly as I have already shewn, when the owner himself who claims the servitude commits the act. Thus in the case from Jacobs, L. D. where the stream of water

was diverted by the person entitled to the use of it having cut the pipe through which it was conveyed, it was held that the right was extinguished. Yet when a person has a right of way to a spring and the spring becomes dry, though the right cease for a time, if the spring chance to flow again the right revives, 1 Dom. 206; which also supports the distinction before laid down between an act of the party and the act of God or of the law. And it appears to have been determined as early as the Year Books, that an incorporeal hereditament once extinguished can be revived only by a new grant. Year Book, 21 Ed. 3, 2. 2 Blk. Com. 177. And in the case of *Marvin vs. Stone*, 2 Cowen's Rep. 807, Judge Southerland says, "the rule is universal that when the remedy is suspended by the act of the party entitled to it, it is gone forever." *James vs. Morris* *Ib.* 258. I do not mean that a person will lose a right by merely ceasing to use or exercise it, but he must do some act by which he secures to himself some other thing inconsistent with the enjoyment of the former. In *Domat* 218, it is said, "if between two houses, one of which cannot be raised so high as to prejudice the prospect of the other, there stands a third house, which not being liable to the same service has been raised and does obstruct the said prospect, the proprietor of the house who owes the service may raise his." The reason is, because the privilege has become useless and cannot be enjoyed. But if the intervening house chance to be removed the service is recovered. But suppose he who claims the service should put up the intervening house himself, will it then be pretended that he can revive the service by pulling it down. I presume not. Because the obstacle raised by himself was of as permanent a nature as the estate to which the service was due. And in that case even the accidental falling of the house, much less the pulling of it down, by the party himself, could

not restore a right which he had voluntarily relinquished. And here also another distinction may be observed, that when a right is suspended by the act of God, as by the drying up of the spring, it will revive again, if the spring chance to flow. But if it be suspended by the act of the party, as by building a house or wall, it would not be restored even though the obstacle should be removed by a stroke from heaven. I think therefore, from these considerations, that the two propositions with which I commenced are most conclusively established—1. That a servitude is extinguished by any obstruction of a permanent nature by the party himself to whom the service is due, (or by his consent,) or by the voluntary acquisition or acceptance of any other right or privilege incompatible with the exercise or enjoyment of it. And 2. That being once lost it is gone forever, and can never be revived but by a new grant. The principle will not apply where the obstruction is for a temporary purpose, even though formed of the most indestructable materials, nor when it is permanent if in aid of the other, even though they cannot be enjoyed at the same time, but must be exercised alternis visibus. Thus for instance, if the creek had been obstructed for the purpose of transporting a single crop across it, or a threshing machine had been erected for the use of the mill; even though the mill must have stood still during its operation, because these would be considered only as different parts of the same system. It is only when from its nature the obstruction is permanent, or the use continuous and incompatible, that such a consequence will result. Let us then see whether the case now under consideration is of that description.

It will be observed that the stream was entirely obstructed by a dam, so that even the merchant mill was not kept in operation by the water passing down the natural current of the creek. But it was diverted from its natural course

into two artificial canals, by which it was conveyed to the respective mills. And it is not pretended that the merchant mill could be kept in operation while the other was supplied with water through the natural channel of the creek. The enjoyment of one therefore was incompatible with the use of the other.

Let us now test the principle by supposing the plaintiff to have erected the same works with the consent of the defendant. Would it not have amounted to a destruction of his right? Most unquestionably; because there would not have been a moment of time when he could have claimed the enjoyment of it. And in that case it will not be pretended that it would be restored by the accidental burning of the mill, or the blowing up of the dam. And is the principle less strong because it is the act of the defendant himself? So far from it, upon every principle of law it operates more forcibly against him.

Hitherto the case has been considered as if between the defendant and Mr. Pinckney, of whom he purchased— But I think it of no unimportant consideration that the present plaintiff was a purchaser for a bona fide consideration at the time when the defendant had thus proclaimed to the world that the privilege which he now claims was useless and even incapable of being enjoyed by him.

But it is said the erection of the new building was not incompatible with the enjoyment of the original right, for it was still exercised and enjoyed by raising the water for the purpose of flowing rice. This argument is built on a total mis-conception of the foundation of defendants claim. It assumes for its basis, that the defendant had purchased the abstract right of overflowing the plaintiff's land.— Now there is no evidence to justify such a proposition — All that can be contended for is, that as he purchased the mill, the pond, dam, &c. passed with it; and that being entitled to the mill he is entitled to every thing that is ne-

cessary to the enjoyment of it. Let us then suppose that the mill, dam, pond, &c. with all the right, members, and appurtenances, had been specifically conveyed, (and the defendant certainly cannot claim more by this deed,) what then would he have acquired? Why the right of keeping up the pond for the purposes of the mill, but for no other purpose. Take for instance the case put by Domat. If a spring from whence a neighbor has a right to fetch water happens to be dried up he will lose the right to enter on the ground where the spring was. 1 Dom. 106. And for the most obvious reason. The object for which the entry was allowed having ceased, the right ceased with it. Thus if a person should have a right of way over another's land to church, if the church should happen to be burnt, his right of way would cease. Nor would it revive though a theatre should be built in the same place. For his right of way was to church, and not to a theatre. The raising the pond for the purpose of flowing the rice, did not arise from any privilege connected with the use of the mill, but from the ownership of the soil, which conferred no right to throw the water back upon the plaintiff's land. And not having been done in pursuance of the right now set up, can add no strength to the defence. Indeed the part of the ground where the pond was, having been converted into a rice field furnishes additional evidence of an intention to abandon it as a mill pond.

It is said that the flood gates were kept up during this whole period; but that is susceptible of the same answer: They were kept hanging to their hinges. But they were as completely divorced from the mill as if it had been burnt down. Indeed for the purposes of the question now under consideration, the mill must be considered as entirely annihilated, because it was kept in operation by means unconnected with the pond which is said to have

been purchased, and as unconnected with the flood gates as if they had been placed on the top of the Andes. Raising the water therefore occasionally, for the purpose of flowing the rice field furnishes no evidence of an intention to preserve the original right ; but was calculated to authorise a contrary inference, as it was converted to another and different use, entirely distinct from the original object.

In the course of the discussion the words forfeiture, abandonment, and extinguishment have been indiscriminately used. For instance it has been contended that the defendant has forfeited or abandoned his right, &c. These words have been made the subject of criticism on the other side. It is contended that they relate only to franchises, corporation rights, &c. and that a person can not abandon or forfeit a freehold by mere nonuser. But it will be observed that this is not a question on the construction of an instrument of writing in which the precise definition of words is to be ascertained. Whether the most appropriate terms have been observed throughout the discussion is therefore quite unimportant to the main object of our enquiry. But I observe that by the civil law writers these terms and others are indiscriminately used. In the Louisiana Code the title of the first chapter on this subject commences, " How servitudes are extinguished." And in enumerating the several methods the fourth is, by the *abandonment* of that part of the estate which owes the servitude. Justinian uses the words, *quibus modis finitur*, by what method or in what manner it is terminated, Cooper J. 468. The language of Heinneccius on the Pandects is, *Quem admodum servitutes amittunter*, 247. Pothier in his Digest of the Pandects makes use of the same language, *amittunter prediales servitutes*, &c. 4 Pothier 352. The case therefore is not to be determined by a criticism upon words. I have cho-

sen the word "extinguishment," whether it is most appropriate or not I do not know, but it appears to me to be sufficiently intelligible. But the defendants counsel are labouring under an error in supposing that the plaintiff claims from the defendant an abandonment or forfeiture of some part of his freehold or something incident or belonging to it. Neither of which is contended for. The defendant does not lose or abandon any part of his plantation by changing the use of it. And if he did the plaintiff would not acquire it. The plaintiff does not claim any thing from the defendant. The land overflowed was as much the property of the plaintiff when covered by the defendants mill pond as it is now. Instead of asking or taking any thing from the defendant he only claims the right of using or enjoying what is his own. The right to overflow the plaintiffs land is not even an incident to the defendants land any more than the roundness of a ball is incident to the matter of which it is composed. It is an incidental quality without which it may as well not exist. Drawing off the water does not effect the right of the land any more than cutting a slice from the ball does the matter which enters into its composition. It changes its quality, but may improve its value. That is a matter of which the party himself was alone entitled to judge. The defendant undoubtedly thought he was improving the value of his purchase by abandoning the lower mill and building the other. It was his own act and the plaintiff only claims the benefit resulting from it.

A servitude is required in this case by the defendant from the plaintiff of overflowing his land. That says the author above mentioned may be extinguished "by abandoning that part of the estate which owes the servitude." It was the plaintiff's which owed the servitude, and that, the defendant has abandoned. Suppose that instead of a right to overflow his land it was a right of way to his own

and by erecting a mill he had overflowed his own land, so that the way had become useless, would it not have amounted to an extinguishment of his right? Is it not in principle the same as the case already mentioned of cutting off the pipe? The defendant has cut off a natural pipe by diverting the water into an artificial one for another and more useful purpose.

So far I have endeavored to support my opinion by authority. But it is said that the common law is nothing more than common sense, or rather that it is the perfection of reason. Let us then consider the case apart from authority, and endeavor to illustrate it by a few cases addressed immediately to the understanding.

Suppose a person to be the owner of a house with ancient lights which no person has a right to obstruct. If he erect a house or put up a wall directly covering his windows, has he not extinguished his light himself as effectually as if he had blowed out his candle? It does not require a reference to Coke, Justinian, or Domat to establish that fact. Surely then it would amount to a license to his neighbor to put up a similar building on his adjoining lot. Suppose A. to have a right of way over the land of B. If he erect a house on his own land in such a manner as to obstruct the passage into the lands of B. does he not effectually destroy his right of way? Can he claim a right the enjoyment of which he has rendered impossible by his own act? These cases are so plain that they must be comprehended by every one. Suppose in the case before us, the defendant instead of purchasing a mill pond with the right of flowing the plaintiffs land, had purchased arable land with a right of way, to haul away his crop. If he had erected the mill which he now has, and thrown the whole of his land under water by converting it into a pond, would he not have destroyed his right of way? Must

?

Mr. Pinckney have kept open a road which terminated at an impassable lake; a way which the owner himself had voluntarily destroyed. It is impossible that such a position can be maintained. I will put but one other case to shew how a right may be extinguished by implication.— Suppose General Hampton instead of purchasing the mill and mill pond had purchased the tract of land which Mr. Taylor now owns, would not Mr. Pinckney by selling that land have destroyed his own mill? By selling that part of the land with all the rights, members and appurtenances thereunto belonging without reserving the right of overflowing, he would have impliedly lost the right, because it would be inconsistent with the enjoyment of the thing which he had conveyed. And being once destroyed would never revive but by a new grant. And in what respect does the case now under consideration differ from those to which I have referred? The defendant has by his own free will and accord abandoned the privilege to which he was entitled. He has cut away his dam, drawn off the water, and turned his pond into an arable field; he has obstructed the natural current of the creek, and turned it into other channels; he has built a permanent valuable mill on the land before overflowed by the pond; he has thus relinquished the privilege to which he was entitled, for these new born privileges of his own creation, the enjoyment of which it is admitted is incompatible with the former state of things. For nine years has the claim now set up been dispensed with, and in all possibility, but for the accidental circumstance of the destruction of the new mill, a revival of it never would have been attempted. Indeed it ought not to be spoken of as a matter of conjecture. No person in his senses would have erected a merchant mill in a mill pond. The very fact of having built on the land previously occupied by the pond carried with it irresistible evidence to all

the world that the pond was forever abandoned. And but for the unfortunate destruction of mill and the blowing up of the dam, the idea of reviving it never would have occurred. But if defendant's right had not become extinguished, when would it have become so? Might he revive it at any indefinite period? Was the plaintiff bound to wait for fifty years, and leave his plantation a wilderness while the defendant was trying experiments, converting ponds into rice fields, and rice fields into mill ponds, until he had ascertained the success of all these experiments? This is a question of great public interest, and it is time that it should be settled upon some known and fixed principles. It must be recollected that the plaintiff has rights as well as the defendant, and all he asks is that he should be permitted to enjoy these rights undisturbed. The defendant having made his election ought to be bound by it, and in my opinion had no further right to disturb the plaintiff in the full enjoyment of his property. I am satisfied with the verdict both as it regards the law and the facts, and the motion must therefore be refused.

New Trial Refused.

NANCY JONES, et. al. Adm'r. vs. DAVID ANDERSON, Ordinary.

To suit on an administration bond, the declaration, going only for the penalty without setting out breaches, the defendant cravedoyer, set out the conditions and pleaded performance. The plaintiff replied that the adm'r. had not truly administered, because she had not paid a certain debt. Demurrer, on the ground that plaintiff did not allege that the administratrix had assets to pay the debt. Demurrer supported.

Suit cannot be brought on an administration bond against the sureties until the adm'r. has been called to account and a judgment obtained against him.

But where creditors sue, quere if it is enough to shew a judgment against the administrator on a plea of plene administravit, and a return of nulla bona? Or should further proceedings be had against the administrator?

This was an action of debt brought on an administra-

tion bond given to the plaintiff as ordinary for Laurens district, against the administratrix and her sureties. The declaration was on the penalty of the bond, without setting out the condition and assigning breaches. The defendants craved oyer of the bond and condition and after setting them out pleaded performance generally. The plaintiff replied that he ought not to be barred, because the said administratrix did not well and truly administer according to law, all and singular the goods, chattels, and credits of the said intestate which came into the hands of the said administratrix, in this, to wit, that the said administratrix did not pay over to a certain Thomas and Samuel Rogers a certain debt, upon which they had obtained judgment against her as administratrix. To this replication the defendants filed a special demurrer, on the grounds, 1st. That it was not alleged in the replication that Nancy Jones as administratrix had been cited to account before the ordinary; and 2ndly. That it was not alleged in the replication that Nancy as administratrix as aforesaid had in her hands assets sufficient to pay and discharge the said judgment; and 3rdly. That it did not appear from the replication, but that the defendant Nancy, the administratrix, had fully administered the estate, which the defendants alleged to be the truth and that the replication in other respects was informal and insufficient.

His honor overruled the demurrer. From whose judgment the plaintiff appealed.

Dunlap, for the motion.

Irby, contra.

CURIA, *per* COLCOCK, J.—In this case the motion must prevail. The demurrer was improperly overruled. The defendant demurs because it is not stated that she had assets sufficient to pay the judgment in question; and it is clear that the replication is insufficient and does not state a breach of the bond; for an administratrix is not bound to

pay all the debts of an intestate. She is only bound to pay so far as the assets will go, and according to a particular order prescribed by law; so that if she has fully administered, or has only so much in her hands as will pay the bond creditors, and this is a demand on open account, she has been guilty of no breach of her bond. In answer to this it is said, that she might plead that she had fully administered. But the reply to that is first, that she was not prepared for that, for she is so charged as to make her liable at all events. It is not put on the footing of her having assets. She therefore denies that enough has been stated to charge her. Suppose to the action of the two Rogers against her she had pleaded plene administravit, and the verdict had been given for her on that plea, and the plaintiff had chosen to take judgment for assets quando acciderunt, has she been guilty of any breach of her bond? Certainly not. If the facts stated are not sufficient to charge the defendant, under any circumstances, the pleading is insufficient. If in one of the events a defendant is liable, it is not sufficient to state one of them. As in an agreement with an alternative condition, to return a horse or pay his value, she was not bound to pay unless she had assets, and therefore it should have been stated that she had them, or that she had acknowledged that she had them, to which she may have replied according to the circumstances of the case. It may be enough for the present disposition of the case to stop here, but as another ground of demurrer has been taken, which may again be taken to the replication, after it is amended, it is perhaps the duty of the court to express an opinion on it. It is the first ground of demurrer stated in the brief. That the administratrix has not been summoned before the Ordinary to account, and therefore cannot be sued, according to the decisions in the case of *Simkins vs. Powers*, 2 Nott and M'Cord 213. and *Ordinary vs. Williams* and

Parkham, 1 N. & M'C. 587. I confess that I have found some difficulty in coming to a determination on this point. The cases referred to are all cases of claims by distributees, and there did appear to be some room for a distinction as to their claims and those of a creditor, as the condition of the bond does indeed refer the adjustment of the claims of distributees more directly to the Ordinary than to any other tribunal. But when the rights of distributees have been settled in a court of Equity, and the administrator fixed with a liability, we have permitted the parties to sue on the bond, and to take judgment against the sureties for the amount established to be due by the other tribunal. Cureton vs. Shelton 3 M'C. 412: so that I am satisfied that the principle on which the cases have been decided applies as well to creditors as to distributees.

The responsibility of the sureties is an ultimate one, and therefore a demand on the part of the applicant must have been substantiated, and the responsibility of the administrator established, before they can be sued on the bond. As to creditors, that may be done perhaps as well on the plea of *plene administravit* to the action brought against the administrator, in his representative capacity, as it could be by the Ordinary or by a court of Equity. But this is indispensable before action can be brought on the bond. This subject is discussed in the case of *Lining v. Giles*, 2 Const. R. Tread. 720. It was an action by a creditor, where Mr. Justice Brevard says, it is held that "no action can be maintained on an administration bond where the breach assigned thereon is the nonpayment of a debt or a *devastavit*, but only for not exhibiting a true inventory and account. For it is said in the words of the condition of the bond, "he shall well and truly administer," are construed to apply merely to the bringing in of a true inventory and account, and this is supported by 4 Burns Ecc. L. 428; 1 Salk. 315; Toller 382. Where a judgment is

obtained against an administrator, his goods cannot be taken until a nulla bona be returned against the goods of the intestate. 1 Saund. 219. The Judge proceeds—"If the administrator is not personally liable till after such an execution and return, upon what principle can it be contended that his sureties are liable? Sureties are entitled to the protection of the law. They are only eventually liable in default of their principal. His default ought to be proved by proper evidence in a case wherein he is made a party, and has an opportunity of defending himself. The plaintiff ought to have sued out a fieri facias on the judgment confessed by the administrator, and if that had been returned nulla bona, he ought next to have proceeded against the administrator, and proved that he had wasted the assets, before he could be entitled to an action against the sureties." And the cases of *Braxton vs. Spotsylvania*, 1 Wash. 31. *Call vs. Ruffin*, 1 Call Rep. 333, and *Gordon's Administrators vs. Justices of Frederick*, 1 Munford 1, all directly support the doctrine. The Judge then concludes that "the court of Ordinary might have been applied to, to coerce the administrator to account; and thus the assets might have been ascertained and made answerable." The first of the cases referred to above, of *Braxton vs. Spotsylvania*, was an action of debt on an executor's bond, which is in almost the same terms of our administration bonds, to subject the sureties to the payment of a bill of exchange, on which no action had been brought against the executor; but it was alleged that he paid debts of an inferior grade and wasted the assets, which was denied. The jury found the debt due and that Moore had wasted the estate. Upon which two questions were raised, 1. Whether an action could be maintained before a judgment first had by the plaintiff against the representative of the debtor, and an execution returned nulla bona. Now although the case differs

from the one which we have now before us, in this, that no judgment had been obtained by the creditor, yet the court went into the consideration of what was necessary to be done before suit could be brought upon the bond, and after deciding that the creditor should have obtained judgment, they held that the creditor ought to have shewn by his action against Moore, the executor, that he had committed a devastavit. A suggestion of a devisavit may be likened to a criminal prosecution, and an executor shall not be presumed guilty of a devastavit until it is found against him by a verdict. It may be objected that the act does not prescribe that a creditor shall not go against the sureties in the first instance, and therefore the action should be maintained, to which the answer presents itself, that it is an established principle of construction, that when the statute gives a remedy not known to the common law, its rules and the practice of the court founded on the reason of the thing shall be pursued. Therefore we are all of opinion that the judgment of the general court be reversed." The case of *Gordon's administrators vs. Justices of Frederick* was in its particulars exactly the case before us, on an administration bond and in a case of a creditor who had obtained judgment, and to this the plea was payment and fully administered. But it did not appear that there had been any intermediate suit fixing a devastavit. The jury found a verdict for the plaintiff subject to the opinion of the court, whether an action on the administration bond could be maintained without shewing in evidence in such action a judgment in an action of devastavit against the administrator. The county court gave judgment for the defendants, which on an appeal to the district court, was reversed and from that judgment of reversal the defendants appealed. The case is elaborately argued and considered, and the case of *Braxton v Spottsylvania* which had been questioned is sup-

ported; and they say the decision was right, that a devastavit must be previously fully established. But says Judge Tucker, who delivered the opinion of the court, that brings us to the enquiry, by what course of proceeding this fact may be found against an executor. And here he goes into a review of the various methods which have been formerly pursued in both courts in England, of a return of the sheriff, proceeding by writ of scire facias, by writ of Enquiry, and lastly by action of debt on the original judgment. The judge then remarks, the executor in either case can plead plene administravit or any other plea which puts his defence on the event of assets, (unless the first judgment were of assets in futuro,) or the declaration should suggest the accrual of assets. The reason is, it would be contrary to what is admitted by the first judgment; for if he had no assets he should have pleaded it; for it is a general rule, that if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it either in another action founded on it or on a scire facias. The action of debt on the first judgment (he concludes,) is the clearest, simplest and most unexceptionable course of proceeding, for here the whole matter is set forth and the executor or administrator put on his guard; whereas by this mode of proceeding on the bond and assigning a breach in a replication, there is great room for surprise. In another part of the opinion speaking of the means by which a creditor may get at the administrator or executor who has not made an inventory, he says he may be summoned before the ordinary, and that that course is conformable to the practice in England, and for which he relies on Nelson's *Lex Testamentaria* 355. Sir Thomas Raym. Rep. 470. 6 Term Rep. 6. And he adds by the same course, the account of his executorship, which is also to be exhibited, "when thereunto required by the court"

may likewise be obtained. And surely this course is infinitely more likely to attain the great ends of justice than to trust to a common jury to adjust and settle a complicated account of an executor or administrator's transactions between a creditor and the sureties; or should a resort to a court of Chancery be necessary that may be had to discover concealed assets.

Upon the whole I am satisfied that no action should be had on the bond until by a proper course of proceeding the claim of the creditor be established and it be ascertained that there are assets sufficient to pay his demand or a devastavit clearly and formally established against the administrator.

The condition of the bond is to be construed as imposing an ultimate liability depending on the establishment of the liability of the administratrix to be ascertained according to the established forms of law. As if A. promise to pay to B. a demand which he claims of C. provided C. should prove unable to pay; in which case A. must sue C. and prove his incapacity to pay before he can sue B.

Demurrer sustained. (a)

(a) Lyles vs. Caldwell, 3 M'Cord 225. Ordinary vs. Maddox, Ib. 237. Cureton vs. Shetton, Ib. 412. See also Magwood vs. Butler, Harper C. R. 264. Glenn vs. Conner, Ib. 267. and Killingsworth vs. Wade, Columbia May 1829, and the next case in the text of Wallace vs. James.

JONATHAN WALLACE ads. **JOHN S. JAMES**, Commissioner in Equity.

A suit at law cannot be maintained on the bond of a Guardian or Committee of a Lunatic, unless the Guardian has accounted, or a specific sum is ascertained to be due.

The Chancellor's ordering the Bond to be sued at Law can give no jurisdiction.

Where Guardians and Trustees fail to make their annual returns as required by the act of Assembly, they must be proceeded against in Equity, and not at law.

Nancy Meheig was appointed, by the Court of Chancery, committee to a Lunatic, and she gave Bond as usual to the Commissioner in Equity, to account annually before him, and the defendant Wallace was her surety on the bond. Nancy Meheig, as usual, not having accounted annually, as she should have done, was summoned by the Commissioner to do so, but she neglected to comply, and she was reported to the Chancellor as a defaulter, under the act of 1824, whereupon that court ordered suit to be brought on her bond, at law. Under this order the defendant as surety was sued, and the question made before his honor Judge Waties, who heard the cause at Laurens Spring Term, 1826, was, whether an action at law could be maintained on the bond, no proceedings having been had in the court of Equity against the principal to account, and no specific sum assessed against her by any court having jurisdiction of her accounts. The question was tried on demurrer. His honor gave judgment for the plaintiff. Defendant appealed.

O'Neill, for the appellant.

Irby, contra.

CURIA, per NOTT, J. The only question in this case is, whether an action can be maintained in a court of law on a guardianship bond? This question has already been twice decided in this court. Guardians are trustees for their wards. The fiduciary character in which they act is

exhibited on the face of the bond. And the very object of a writ against a guardian is to ascertain whether he has faithfully discharged his trust. It is therefore clearly a case of Equity jurisdiction. Whenever the guardian has accounted, or whether he has or not, as soon as any specific sum is ascertained to be due, an action may be brought on the bond for the purpose of recovering that amount. (a) It is contended that the order of the Chancellor directing the bond to be put in suit, gives jurisdiction to the court. But it is not in the power of the chancellor to transfer the jurisdiction of that court to a court of law. That order is supposed to have been made in pursuance of the provisions of the act of 1824. But that act does not confer any such authority. It enjoins it upon the chancellor as a duty, to require guardians and trustees to make accurate returns of the disposition of the funds in their hands belonging to infants. It makes it the duty of the commissioners at every court, to make a report of all guardians and trustees who have neglected to make such returns. The act then proceeds "to make it the duty" of such presiding judge, (meaning the Chancellor,) to order proceedings immediately to be taken *before the Commissioner*, for compelling such guardian or trustee to render a full account before the next sitting of such court, and make such further and other order as may be necessary to justice and to a correct and honest administration of the estate of minors and cestuique trusts, to discharge such guardian or trustee and appoint others, or to make such order as to him may seem meet, saving and reserving in all cases a right of appeal to the appeal court.—The act throughout couples guardians and trustees together as possessing the same character, but contemplates the

(a) See all the cases collected and reviewed in *Killingsworth vs. Wade* and others, Columbia, May, 1829, on the Equity side of the court, and in the preceeding case in the text.

court of equity as possessing the sole and exclusive jurisdiction over them. It must be seen at first view, that the court of law is utterly incompetent to the duties required by the act. The forms of proceeding will not authorise it. It is said the court may give judgment for the penalty. But that would only be laying the foundation of a recurrence to the court of equity for relief. The legislature could never have intended that the court of equity should send the parties to a court of law to run the whole round of litigation incident to those courts for the purpose of bringing them back to the same court for relief. For it is in that court alone that complete and adequate relief can be administered at last. Indeed if there is any part of the equity jurisdiction which is particularly valuable, it is that which the chancellor exercises in the cases of trustees, guardians, and minors. I am of opinion therefore that the decision of the judge below ought to be reversed, and that judgment be given for the plaintiff in demurrer.

Judgment reversed.

DR. THOMAS WELLS VS. JAMES KENNERLY.

Where a person who hires a Slave sends for a physician to attend him while sick, the person so employing the Doctor, and not the owner of the Slave, is liable to the Physician.

From the nature of the bailment the obligation is imposed on the person hiring the slave.

Defendant hired his slaves to Miss Adams and E. Peck, who called on plaintiff to attend them while sick, informing him that they belonged to defendant, who was charged by plaintiff. The case was tried on summary process. The only question was, whether the defendant was liable under the circumstances, or whether the physician should have charged the hirers who employed him. Several

witnesses were examined as to the custom of the country in the payment of medical bills incurred for hired slaves, but they differed in opinion. The Court decreed for the defendant.

M'Clintock, for the motion.

Gregg, contra.

CURIA *per* COLCOCK, J. In this case the motion must be refused—whether it be determined by the rules of law or the policy of the country. There is no privity of contract between the plaintiff and defendant, and a voluntary service rendered to a slave, when his master is at hand cannot create a responsibility, except under some peculiar circumstance of sudden emergency. The service was rendered to the defendant, and was for his immediate benefit. It may be, and no doubt is always made the subject of contract, whether the expenses attendant on the sickness of a slave shall be borne by the master or the person who hires him. If by the former, the amount can be deducted out of the wages. If by the latter, he is of course answerable to the physician. So that it is evidently more proper to charge the person employing. It is in the regular and natural course of business, and in conformity with the abstract principles of the law. Something was said as to custom in this case, but custom is wholly out of the question. There is not, nor indeed can be, any custom on the subject, which will controul the law. Look at the disagreement which appears among the very few witnesses introduced on this occasion. A custom to prevail must be general, uniform, convenient, and well established. Now this custom is heard of for the first time in this court. Our books furnish no such case; but on the contrary there are those which are most clearly opposed to any such implied obligation as is here contended for. In the 2 vol. Const. Rep. p. 348, the judge says, if one has my fence out of repair and choses

to repair it, he cannot charge me ; nor can he afterwards take away plank which he has nailed to it. And in *Dunbar vs. Williams*, 10 Johns. 249, it was expressly determined, that a physician who had attended a slave without the master's knowledge or consent, could not maintain an action against the master. Indeed there is no foreseeing the consequences that might result to the owners of slaves, if they were to be made liable for any services rendered, or articles furnished to their slaves. In the case before us, from the very nature of the obligation imposed on the person hiring, the absolute control over the slave is given up by the master. The obligation to supply his daily or hourly wants must necessarily be assumed by the person who takes this absolute possession of a slave. The motion is dismissed.

Decree affirmed.

GAFFNEY VS. BRANHAM.

The court will not order a consolidation where one of the cases is within the Summary Process jurisdiction, and the other beyond it.

N. R. EAVES VS. J. W. TERRY.

The Commissioners of the Roads are authorised by the act of 1788 to cut down and use such native forest trees as are unreclaimed and unappropriated to any particular use, as may be near the high roads, private paths, bridges, &c. for the purpose of making and repairing them, notwithstanding the trees are enclosed in a fence.

Trees reserved for ornament, and those cultivated for use, have always been exempted.

This was an action of trespass *quare clausum fregit*, tried at Chester Spring Term, 1826, in which the defendant was charged with entering the enclosed lands of the

plaintiff, near the village of Chester, and cutting down and carrying off plaintiff's trees. Defendant admitted the trespass as alleged, and stated in his plea, that being overseer of the roads near the land of plaintiff, he in pursuance of an order from the Commissioners of Roads for his district or division, without making or tendering any compensation to the plaintiff, committed the trespass complained of, and so justified under the act of the legislature of 1788. The plaintiff demurred generally, and defendant joined in demurrer. The court gave judgment for defendant in demurrer. The plaintiff appealed on the grounds that the act of 1788 did not authorise the commissioners to enter enclosed grounds and cut the timber without making or tendering compensation, and if it did that it was unconstitutional and void; and that no such power was given under the act of 1788.

Williams, for the plaintiff. The law makes a great difference between entering inclosed and uninclosed grounds. The law of possession proved that. So a party may justify an assault and battery in defence of his possession. Hunting is allowed on uninclosed grounds, but not so in fields. *M'Conrico vs. Singleton*, 2 Const. Rep. 244. *Broughton vs. Singleton*, 2 N. & M'C. 338. The legislature then did not intend enclosed grounds to be entered. Besides what kind of wood was to be taken? Fruit trees, shade trees, or ornamental trees? May the commissioners take the rock which the defendant has brought to build with?

Ellison and A. W. Thompson, contra. Timber trees have a distinct meaning. It did not mean fruit or shade trees. Suppose the whole country was inclosed, how would the roads be repaired? *Lindsay vs. Commissioners*, 2 Bay 38. *Stark vs. M'Gowen*, 1 Nott & M'Cord 387. *Vattell B. II. Ch. X. §132.*

CURIA, *per* JOHNSON, J. The counsel for the plaintiff

have not insisted on the first ground of this motion, and since the case of *Lindsay vs. the Commissioners*, 2 Bay 38, the constitutional right to exercise this power purely for public purposes, has not as far as I can learn, ever been seriously doubted. All the cases proceed on the ground that there is a tacit reservation in every grant of freehold, of so much as may be necessary for the ordinary purpose of making roads and public highways; and as a part of the eminent domain, the legislature has a right to set it apart for that use, when public convenience requires it. *Stark vs. M'Gowen*, 1 Nott and M'Cord 387. *State vs. Singleton*, and *Commissioners vs. Withers*.

The act of 1788 declares "that the commissioners of the roads, or a majority of them, according to their respective divisions, shall have full power to cut down and make use of, any timber, wood, earth, or stone in or near the said high roads, private paths, bridges, creeks and water courses, for the purpose of making and repairing the same, as to them shall seem necessary." P. L. 445. And the argument of the counsel in support of the second ground, is that the defendant was not justified in cutting the trees in question, because they were inclosed within a fence, and he urges that this was such an appropriation of them to the private use of the plaintiff as to take them out of the meaning of the act, contending that the same literal construction of the act which would justify the defendant in cutting them would also justify his taking the trees of an orchard, or those reserved for ornament, or even in demolishing buildings for the purpose of these repairs.

The terms of the act appear to me *ex vi termini* to refer exclusively to native forest timber trees, and in their practical application, which generally furnishes the safest guide to their interpretation, trees reserved for ornament and those cultivated for use, have always been respected as exempted from the operation of the act. The trespass

complained of in this case is for cutting native forest trees, unreclaimed and unappropriated to any particular use, and the circumstance that they were inclosed in a fence is all that is relied on by the plaintiff. If by an ordinary fence the right to use them is taken away, a furrow or ideal line must have the same effect, and the act would exhibit the strange absurdity of conferring a right without the power of using it.

Motion refused.

JULIUS M. MARTIN, et. al. vs. ROBERT LATTA.

The lands of an intestate may be sold under an execution obtained against the administrator, without making the heirs parties to the proceedings, notwithstanding there may be sufficient personal assets to satisfy the debts.

This was a suit for partition of a tract of land among the demandants, which had been sold by virtue of an execution against the administrators of John Martin deceased, the father of the demandants. The defendant, the purchaser under the sheriff sale, pleaded that he was not a cotenant with the demandants, and that he was legally seized and possessed of the land in dispute in his own demesne as of fee. The only question submitted to the decision of the court was whether the lands of the intestate could be sold by the sheriff, under an execution obtained against the administrator, there being sufficient personal assets to pay the debts, without making the heirs parties to the proceedings. His honor judge Waties, who heard the cause at York, was of opinion that the lands were liable to be sold under the execution and non-suited the demandants, who now brought up the question to this court.

Rogers contended that lands could not be sold. No power is given to an administrator over them. He read the

28 Sec. of the act of 1789, Public Laws 494. That act says the growing crop shall pass with the lands. Why protect emblements and not the land itself? The personal property is the primary fund for the payment of debts. 3 Des. Rep. 115. 4 Des. Rep. 329. 2 M'Cord's Ch. 302. The writ of attachment in this case did not mention the lands. But the judgment was entered up against the lands. To permit the lands to be sold, would be putting them entirely within the power of the administrator. The administrator should his interest be different from those of the heir at law, might destroy the rights of the heir, by his own misconduct in not paying the debts.

The case of *Ash vs. Livingston*, 2 Bay 80, he thought not exactly like the present case. As to *D'Urphey vs. Nelson*, 2 Brev. MS. Rep. 23. (a) he thought it as much

(a) *D'Urphey vs. Nelson*. In the Constitutional Court at Columbia, Nov. 1803 Present all the Judges, except Bay, J.

This action was brought to try titles to land, and was tried before Grimke, J. in the District Court of Fairfield. The defendant claimed the land in dispute by virtue of a deed of conveyance from the sheriff of Camden District, made pursuant to a sale under an execution sued out upon a judgment obtained by Minor Winn against the administrators of Wm. D'Urphey deceased, the father of the plaintiff, (who claimed as heir at law of the said deceased,) upon a bond given by the deceased who died intestate. The judgment was produced in evidence; and upon looking into the record it appeared the administrators had made default, and the judgment was entered up according to the usual form in such cases.

It was objected on the part of the plaintiff that the lands of the intestate were not liable to seizure and sale under the judgment and execution against his administrators; particularly as the judgment was taken by default, and there had been no pleadings to render the lands liable upon a deficiency of personal assets, according to the old rule of court which requires a suggestion that there are lands, &c. This objection was held good by Grimke, J. and the sheriff's deed held void, as founded upon a sale made

for him as against him. The MS. case was somewhat different from a note of the same case by Judge Brevard

without legal authority; and in consequence the verdict was for the plaintiff. The defendant appealed.

The motion in this court was argued by Blanding for the defendant, and Evans for the plaintiff.

By the Court. At the common law lands were not subject to execution. Goods and chattles might be seized and sold by writ of *fi. fa.* and the profits of land could be taken by *levari facias*.

The Stat. 13 Ed. 1. C. 18. Westm. 2. gave the writ of *eligit*, which was the first remedy given against lands in England. The remedy by statutes merchant and staple, and by *elegit*, was by judgment and execution, or *extent*, for satisfaction of debts acknowledged by record, by virtue whereof the lands were delivered to the creditor, by process directed to the sheriff, and appreciated by the jury, 2 Woodd. 145.

At common law, upon the death of the ancestor, his lands descended to the heir, and were not liable for the debts of the ancestor, except such as were due by specialty, wherein the heir was named. And if the heir aliened before action brought, the creditor was without remedy. So if the debtor devised away his land, the devisee was not liable for his debts.

The Stat. 3 and 4 W. and M. c. 14. P. L. 87, makes the heir answerable for the value of the lands descended; and avoids such devises to the prejudice of creditors; and the value of the lands descended is to be ascertained by a jury.

The Stat. 5 Geo. 2 C. 7. P. L. 250, enacts "That lands, negroes, and other hereditaments and real estates, of persons indebted, shall be liable for their debts, and shall be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable by *specialty*, and subject to like remedies, &c. for seizing, extending, selling and disposing thereof for such debts, in like manner as personal estates in the plantations are seized, extended, sold or disposed of for satisfaction of debts."

First. Lands of the debtor are made liable for *all his debts*, and are made *assets* for satisfying the same, in like manner as real estates are liable in England by *specialty*, to wit:

1. The lands are liable from the time of the judgment rendered against the debtor himself, if judgment be recovered in his life time.

in his Digest 2 vol: p. 2. The case of Webb vs. Baker, 1 Haywood 45. was a well considered case. As to the

2. They are made liable in the hands of the heir, though he is not named in the contract; and though the contract be simple and not in writing.

3. They are liable in the hands of the heir from the time that suit is commenced against him.

4. They are liable, or rather the heir is answerable for their value if aliened by him before suit brought.

5. They are liable, though devised by the debtor.

Secondly. The lands of the debtor are made subject to *like remedies* for seizing and disposing thereof for his debts, in like manner as *personal estates* in the plantations are seized and disposed of for satisfaction of debts; that is to say, they are made liable to be taken by writ of *fi. fa.* in all cases where chattels are so liable, and sold &c., or to whatever other remedy chattels are liable in the respective Colonies or States of America.

Being made liable in *like manner as personal estates*, the act cannot be construed to make any distinction between lands and personal chattels, but they must be considered as equally liable for satisfaction of debts, and to be assets for that purpose in the hands of the personal representatives of the debtor. And therefore in this case, where the judgment was recovered against the administrators, for the debt of their intestate, after the lands of the intestate had descended (as it has been contended,) to his heir at law, and never came into the hands of the administrators, although upon the principles of the common law the heir should have notice, and an opportunity of defending his estate before he can be divested of it, and it might be reasonable (as it has been argued,) that a *sci. fa.* should first go to call upon him to show cause why the lands should not be taken to satisfy the debt, before the execution should issue to seize and sell the land, yet as the act of 5 Geo. 2. makes no distinction between lands and chattels, and contains nothing to show that it was the intention of the act to make the lands liable only in cases where there should be a deficiency of personal estate, the lands of the intestate must be regarded as liable to execution as personal property, and to be taken and sold as such, without discrimination or exception.

The act of Geo. 2. was certainly intended for the benefit of the

rule of court in relation to the plea of plene administravit, he thought that the necessity of putting in that plea, was

creditor. The rule of court which requires executors and administrators to file an account of their administration on oath with their pleas of plene administravit, was intended for the benefit of the creditor as well as of the heir. But the rule of court which requires that before judgment shall be rendered to make lands of a testator or intestate liable, there shall be a suggestion by way of replication to such plea of plene administravit, filed on oath, that there are lands, &c. certainly cannot repeal, or prevent the operation of the Stat. of Geo. 2. At any rate it cannot affect this case where the administrators did not plead at all, but suffered judgment to go by default. The creditor is not to lose his remedy against the real estate of his debtor, because the personal representatives of the debtor neglect or refuse to do their duty. It is their duty to see that the personal assets are first exhausted before the real estates are resorted to. But the extreme anxiety observable in the common law of England to preserve the rights, and favor the claims of the heir at law, has been entirely dismissed from our law. The rights of primogeniture have been abolished, in consequence of which, and of our act of distributions, the heirs of the real estate, in case of intestacy, are the same persons who are entitled to distributive shares of the personal estate; for the estates real and personal undergo a division and transmission exactly alike, so that there cannot be any ground for contention on the score of interest between the heirs of the land, and claimants of the personal estate, for their claims are concurrent, and not adverse; they are in fact the same persons: and therefore there is no reason for giving notice to the heir, or proceeding against him by sci. fa. before issuing execution to sell and seize the land.

In this case, however, it appears the judgment is defective and is now objected to by the plaintiff, for that it is entered up against the administrators by name, without specifying in what manner the debt is to be levied, or naming them as administrators. By adverting to the writ and declaration it is evident the defendants were sued in their representative character, and for a debt of their intestate; but the judgment is defective in omitting to express in what manner the debt should be levied. Yet the sheriff's deed which cites the execution, shows that the execution authorised the sheriff to seize and sell the lands, &c. of the intestate in the

(Grimke's Exors. 451,) founded on the rule of law that the personal assets were to be exhausted before the land should be sold. The administrator has no direct power over the lands. He is liable as any other person for a trespass, and yet indirectly he has power to supersede the rights of the heir.

Norr, J.—If the administrator plead the plea of plene administravit and shews that he has administered all the assets, the plaintiff may allege that there are lands, and it has been the practice to suffer the plaintiff to take judgment against the lands.

Rogers—He thought that proceeding very proper; but the heir should have notice. He should have the opportunity to investigate the correctness of the plea of plene administravit. If the rule contended for in this case was sanctioned, the heir may be defrauded in every case; for as he knows nothing of the suits for and against the administrator, a creditor might take out execution against the administrator, entirely without the knowledge of the heir, and before the heir could possibly know, the sheriff

hands of the defendants to be administered. The court will not lay hold of this objection which was not made at the trial, to deprive the defendant of a new trial. But it is recommended to the defendant, to apply to the district court to amend the judgment, before the new trial takes place; for sheriff's sales ought to be favored and supported as far they legally may.

A new trial was granted. (a)

Note. In Massachusetts, at an early period of their government, the county courts had jurisdiction in testamentary matters. In the beginning they so far followed the civil law, as to consider real estates as mere *bona*, and they did not confine themselves to any rules of distribution then in use in England. See Hutchinson's Hist. of Massach. vol. 1. p. 393.

(a) See Hayw. 43 65 35 92 Baker vs Webb, and Bell vs. Hill. See 2 Johnson's N. Y. Term. Rep. 251. Lands liable to payment of debts by Stat. 5 Geo; 2, c. 2.

may have sold his freehold and made a title of it to another. The heir cannot be deprived of his rights until he has been made a party to the proceeding. He may be absent from the part of the country where the lands lay or where the administrator resides, and the whole transaction from the beginning of the suit to the sale of the land might be consummated without the knowledge of the heir. It would be committing the lamb to the wolfe. The courts are said to protect the heir. But in this case the administrator had confessed judgment, which was a confession of assets, and this valuable tract of land was put under the hammer to pay the small balance on the judgment.

Wallace Thompson—same side—Cited *Webber vs. Higgins*, in Equity.

Williams in reply.

CURIA, *per* COLCOCK, J.—The counsel for the appellant has presented some strong arguments against the construction which has been long given to the statute of Charles in this state, and pointed out very clearly the technical difficulty which has resulted from that construction, of selling one mans land under a judgment and execution obtained against another. But even if the objections were greater we could not at this day depart from that construction which the statute has received for 20 or 30 years. For by doing so we should jeopardize one half of the landed estates in the country. Since the construction which was given to the statute by which lands have been considered as equally liable to the debts of the ancestor as chattels; it would not be venturing too far to say that two thirds of the valuable land in the state have passed through different hands. But when we lay aside those distinctions between land and personal property which arise from feudal doctrines, the principal objection to the construction which has prevailed here, is, that it

operates to deprive the heir of his land without his knowledge and often times when the personal estate has not been all disposed of.

But upon a little examination we shall find that from the changes which have taken place in our laws of descents, and in the relative value of real and personal property, that these objections have lost much of their force, and that in truth nothing remains but the technical objection; and the force of that is much diminished by the adaptation of the legal process to the construction which has prevailed.

By the act of 1791 there is now no individual who stands in that relation to the executor or administrator that the heir at law did, and consequently there is not that collision of interest which subsisted between them. (a) The land as well as the personal property is distributable among all the children in equal shares. So that in a case of intestacy all the family are interested in the land; and therefore it is not very important which is sold first the land or personalty. And in the case of a devise of land, the 3. and 4 Wm. & Mary, Ch. 14, destroys the old common law notion that the devisee by taking as a purchaser excluded the creditor, and the lands devised are still liable to the debts of the testator. The devisee then may very easily protect his rights by making enquiry into the affairs of the estate, as he would have an undoubted right to do. Where the whole family are interested in the land, it would be often times a great hardship to compel the executor or administrator to sell all the personal estate before the land; for it frequently happens in the present day that the personal is more valuable than the real estate, and it would amount to a serious injury to pursue the old common law doctrine which was intended

(a) See *Hall vs. Hall*, 2 M'Cord's Chancery Reports. 302.

for the benefit of the heir. The technical objection has induced many persons to make up their proceedings in such a manner as to show a full administration of the personal estate and then to suggest that there are lands, but this in fact did not remove the difficulty, for it did not operate as a notice to the heir or devisee. But this practice fell into disuse, for it was said if the land was equally liable with the personalty why say any thing about it in the record, it is enough, to frame the execution in such a manner that the land may be taken by virtue of it and sold. Nothing is said in the proceedings generally against a debtor as to the particular kind of property which he possesses. It was therefore enough to convert the old *fi. fa.* which it is admitted was a process operating at the common law only against personal property, into an execution against the lands also, and this is now invariably done. So that notwithstanding the true interpretation of the statute of Charles may have been that the land should be made liable by proceedings against the heir or devisee, yet in fact the purpose is sufficiently effected by our mode of proceeding, and the well established doctrines as to the rights of devisees.

Motion Dismissed.

SURVIVORS OF HALLS, KIRKPATRICK, & CO. VS. COE,
GREEN, & RANDOLPH.

One of several co-partners can discharge his individual debt to a third person, by releasing or giving a receipt to such person for a debt due by him to the firm.

Coe, Green, and Randolph had been partners in the business of Blacksmiths. Coe was the only blacksmith, and was the acting partner in attending to the business of the concern. On the 17th of January, 1822, Green introduced Coe as a partner of Coe, Green, & Randolph,

to Halls, Kirkpatrick, & Co. and requested them to let Coe have whatever might be wanted for the shop on account of Coe, Green, & Randolph. The firm of Coe, Green, & Randolph was dissolved in January, 1823, though the dissolution was not known to Halls, Kirkpatrick, & Co. before February 1823, and not published until April 1823. On the 13th February 1823, the account against Coe, Green, & Randolph amounted to \$593 82. Halls, Kirkpatrick, & Co. had also a running account against Coe individually, which on the 31st of August, 1822, amounted to \$248 75, and in September 1823, to \$388 75. Coe, Green, & Randolph had an account against William Hall, one of the partners, amounting in December 1822, to \$156 37. Coe, Green, & Randolph held Hayne's order for \$74 43, and Levy's order for \$45, in their favor, drawn on and accepted by Halls, Kirkpatrick, & Co. some time in the year 1822. On the 31st of August 1822, Coe being at the store of Halls, Kirkpatrick, & Co. they requested him to settle his private account. He said he had not the money, but that they might charge his private account, amounting at that time to \$248 75, to Coe, Green, & Randolph; he at the same time gave them in the name of his firm a receipt for so much money on account. In February 1823, before the dissolution of the firm of Coe, Green, & Randolph was known to Halls, Kirkpatrick, & Co., Coe settled \$248 75 of his private account with Halls, Kirkpatrick, & Co. by giving a receipt for the shop account against William Hall, and by giving up Hayne's and Levy's orders to Halls, Kirkpatrick, & Co. who accepted their account against Coe individually for that amount, and applied the balance of \$29 37, as a credit on their account against Coe, Green, & Randolph, leaving a balance of \$564 45, for which this action was brought. Green and Randolph were not consulted by Halls, Kirkpatrick, & Co. in relation to this settlement,

either in August 1822, or February 1823. It also appeared that Coe took the benefit of the prison bounds act in March 1824, and a witness swore he would not have trusted him for \$300, and considered him insolvent in 1822. The technical objection to William Hall's account as a discount, was waived by the plaintiff. The defendant's counsel contended that the above mentioned settlement was not sustainable, and that the amount of the account against William Hall and of the two orders, should have been applied to the credit of the account against Coe, Green, & Randolph, and now offered them together with the orders as a discount. The court, (James, J.) instructed the jury accordingly, and the jury found a verdict for the balance of \$284 58. The plaintiff appealed on the ground that the settlement was legal and valid, and the discharge signed in the partnership name, conclusive against the firm, and therefore the discounts should not have been allowed.

Preston, for the appeal cited 1 Montagu Part. 1. 7 East. R. 210.

DeSaussure, contra, cited 1 East. Rep. 47.

THE COURT. Cannot a member of a firm receive money on a debt due to the firm, and then apply the same money to pay his private debt to the very person from whom he received payment for the debt due to the firm?

DeSaussure. He admitted that was the very question in the case, and put in the strongest point of view. He thought the partner could not, and cited Montagu on Part. 29, 30; 4 John. R. 251, 270, *Livingston vs. Roosevelt*. 2 Caines Rep. 246. If the plaintiffs knew that one of the firm was committing a fraud upon the others by paying his private debts with the money of the firm, or by giving the receipt, the transaction would not bind the firm. 8 Ves. 540; 15 John. R. 34.

Gregg, in reply, cited 1 Mont. 23 ; 2 Campb. 561 ; 4 John. Rep. 280 ; Addison's R. 259 ; 4 Day 428 ; 13 East, 142.

CURIA, per NOTT, J. The simple question is, whether one copartner can discharge his own individual debt by releasing a debt due to the firm ? It is admitted that he can sell the goods, collect and pay away the money, give receipts, and even pay his own debts out of the copartnership funds ; so that if he had received the money in this case and returned it immediately to the plaintiffs, it would have been a good discharge of both debts. If so, why might not the same thing be effected by the single operation of executing mutual releases. It is much more consonant with commercial usage, and carries with it less suspicion of fraud than the mock ceremony of paying the money with one hand and receiving it back with the other. But let us test the principle by bringing it down to the common affairs of life. A physician may be in the habit of attending the usual members of a large commercial establishment, and of taking up goods from their store at the same time, may not each member of the firm at the end of the year pay off his account by entering a credit to the physician on their books, and charging himself with the amount ? The same thing may be done with his lawyer, his tailor, his blacksmith, and so on through all the relations in which the diversified accounts of an extensive establishment can run. Neither would the case be varied if the individual who has thus discharged his own debt, should neglect to charge himself with the amount on the books of the firm, even though it were done with the express view of defrauding his copartners ; for if the debt be justly due, it is immaterial as it regards the creditor to whom it is paid, what are the motives of the debtor, or in what manner it may affect the interest of those with whom he is connected. Each member of a

firm is the accredited agent of the rest. They recommend him to the world as entitled to their confidence, and if he abuse his trust, the loss must fall upon those who have conferred upon him such authority, and not upon those who have trusted him upon their recommendation. It would be destructive of all confidence, and subversive of the first principles of such associations, if the law were otherwise. The case of Henderson and Smith vs. Wild, 2 Campbell 561, is in conformity with this opinion. The defendant was a tailor and had done business on the separate account of Smith, one of the plaintiffs, he was indebted to them for goods which he had taken up at different times, and now produced the receipt of Smith, one of the plaintiffs, in bar of the action. It was alleged that the receipt was obtained after the dissolution of the copartnership, and antedated for the purpose of giving effect to the settlement. The court held that the receipt was good, notwithstanding it operated to the benefit of one of the plaintiffs only, if it were given bona fide. But, that if given after the dissolution of the copartnership, and after the advertisement in the Gazette, it must be considered fraudulent and void. It is admitted in this case that if the receipt were given after the partnership was dissolved, and after it was known to the plaintiffs, they can derive no benefit from it; and that may be a question for future investigation. Some reliance has been placed on the circumstance that the individual account of Coe was actually charged to the company some months before the settlement of the accounts took place, but it does not appear to me to vary the question; for although one partner cannot bind the company to pay his individual debts, and the plaintiffs could not if they had sued, have recovered the amount of that account against Coe, Green, & Randolph, yet as Coe thought proper to pay it himself, it was immaterial whether it stood in the books as a

charge against him or against the firm. I am of opinion that a new trial ought to be granted.

COLCOCK, J. dissented from the result of the opinion, but gave no reasons.

New trial granted.

BOYCE vs. BARKSDALE, Sheriff of Laurens.

Where a defendant is in gaol under a Ca. Sa. and escapes, the plaintiff has two remedies against the Sheriff, i. e. An action of *debt*, wherein he will be entitled to recover the whole amount of his judgment against the prisoner; or an *action on the case* for damages by reason of the escape, in which the jury will be allowed to assess damages according to the circumstances.

To an action on the case the sheriff may prove that the defendant was insolvent, in mitigation of damages.

Quere, if the sheriff is liable at all events for an escape, (there being no negligence,) of a prisoner under final process, as in England?

The defendant being sheriff of Laurens district, had one Adair in custody, under a ca. sa. of the plaintiff's against Adair for \$299 18, with interest from Nov. 1822. Adair was confined in the goal, wherein the sheriff did not live nor any other person than a negro woman, a servant of the sheriff. The goaler resided in a neighbouring house. Evidence was given by the defendant of the insolvency of Adair. This was an action on the case for an escape.

WATIES, J. who tried the cause, charged against the defendant, on the ground of negligence, but held that he might prove that Adair was insolvent, to shew that the plaintiff was not entitled to damages. That if it was fully proved that Adair was insolvent, then the plaintiff had sustained no damages, and could not recover against the sheriff. The jury found a verdict for the plaintiff for a sum less than the judgment against Adair.

O'Neill, for the plaintiff, appealed from the verdict on the ground that the measure of damages was the debt,

interest and cost in the case in which the prisoner was confined ; and that the sheriff was equally liable whether the defendant Adair was insolvent or not. It was the duty of the sheriff to have his body, according to law, to satisfy the plaintiff, and if the sheriff was permitted to avail himself of such a defence, he could at his pleasure discharge every insolvent person who was committed under a ca. sa. at his will and pleasure, with impunity. What then would come of satisfaction by the body of the debtor ?

Farrow and Bauskett, contra.

CURIA, *per* NOTT, J. I understand the judge to have instructed the jury, that the fact of negligence was sufficiently proved if the defendant's liability depended alone on that fact. But that admitting the escape to have been effected through the negligence of the sheriff, yet if the plaintiff had not sustained any injury thereby he would not be entitled to recover. The defendant was therefore permitted to go into evidence to shew the insolvency of the prisoner to enable the jury to determine whether any and what damages had been sustained by the plaintiff.— And the important question now to be submitted to the court, is whether such evidence was admissible, either by way of justification or in mitigation of damages, or whether the jury ought to have been instructed to give the whole amount of the debt due by the prisoner to the plaintiff. That question ought perhaps to be considered as settled in the case of *Brown vs. Belcher*, decided in this court at the Spring Term, 1825. (a) But if the principle is not embraced in that case, numerous others may be adduced in support of the opinion of the presiding judge. The plaintiff may proceed against the sheriff in an action of debt, in which he will be entitled to re-

(a) The opinion of the court in this case has been lost, by some means or other.

cover the whole amount of the judgment against the prisoner, or by an action on the case for the damages sustained by reason of the escape, in which the jury will be at liberty to assess damages according to the circumstances. 1 Chitty Plea. 140, 141, 6 Johnson 270, Van Slyk vs. Hogeboom. 2 H. Blk. 112, Alsept vs. Egles. 2 Johnson 454, Rawson vs. Dole. 2 D. and E. 126, Bonefors vs. Walker. The evidence therefore was properly admitted. The English doctrine on the liability of sheriffs is rigorous and harsh, more so perhaps than comports with justice and good policy. That a sheriff should be liable at all events for a person in custody on final process, when no negligence can be imputed to him, can hardly be justified upon any correct principle. It is probably founded on the peculiar policy of England, and whether it would be carried to that extent in this country, is I think questionable. But a sheriff is entitled to but little commiseration who voluntarily permits an escape, or when it results from gross negligence. If therefore the jury had given the whole sum in this case, I am not prepared to say that I should have been dissatisfied with the verdict. But as they have thought proper to assess a smaller sum, I do not think that the court can interfere.

New Trial Refused.

BOYLESTON, and others vs. CORDES, and others.

Where several joint tenants, tenants in coparcenary, &c. bring a joint action of trespass to try titles, and pending the suit one of them die, the action does not abate, as to those who survive. By the act of 1746, if there be two or more plaintiffs or defendants and one or more of them die, if the cause of action survive to the surviving plaintiff or against the surviving defendants, the action shall not abate; but the death being suggested on the record, the suit may proceed for or against the survivors.

The plaintiffs suing for the whole may recover such part of the lands as they prove a title to.

This was an action of trespass to try titles, and while the cause was at issue, one of the plaintiffs, Theodore Gourdin, died, and his death was pleaded in abatement. To this plea the surviving plaintiffs filed a demurrer which his honor Judge *Richardson* sustained. This was an appeal to reverse his judgment.

Preston, for the appeal. It is conceded that by the common law, where one of several plaintiffs die the suit abates, (1 Com. Dig. Tit. Abatem't. H.) and that although the action survived. By the Stat. of 8 and 9 Will. III. the writ does not abate where the action survives. The act, Pub. L. 212. 2 Brev. 119, is in the same terms as the Stat. of William. The word *survives* used in both has a technical meaning and refers to those cases in which the whole cause of action survives, as in cases of copartnership, but not where a part only survives, as in this instance.

Evans, same side. Under the act of distributions, the death of one of the joint tenants is a severance, and his interest passes to his next of kin. *M'Fadden and wife vs. Haley*, 2 Bay 457. One of several joint tenants may recover.

Miller, contra. If the death of one joint tenant abates the action, the difficulties would be insuperable. The question of abatement did not arise in the case of *M'Fadden vs. Haley*.

CUMRA, per NOTT, J. It is admitted that at common law, an action abated by the death of one of several plaintiffs, although another action might be brought for the same cause by the survivors; but by the act of 1746, P. L. 212, it is provided that, if there be two or more plaintiffs or defendants, and one or more of them shall die (if the cause of such action shall survive to the surviving plaintiff, or against such surviving defendants,) the writ or action shall not be thereby abated, but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants. The question now to be determined, is whether the cause of action in this instance survived to the surviving plaintiffs. In the case of *Denn ex. dim. vs. Purvis et. al.* 1 Burrow 326. the plaintiff, Mrs. Burgess, brought an action of ejectment, for one half of the premises in question. In the course of the trial it appeared that she was entitled to but one third. A verdict by consent was given for one third subject to the opinion of the court, whether the plaintiff on her declaration for a moiety could recover one third part of such premises, and Lord Mansfield, in giving the opinion of the court said "it was an exceeding plain case. The rule, says his lordship, is undoubtedly right, 'that the plaintiff must recover according to the title.' Here she has demanded half and is only entitled to a third, and so much she ought to recover." The other judges concurred in that opinion and the postea was delivered to the plaintiff. In the year 1802 a similar question arose in our own courts, and was determined in conformity with that decision. *M'Fadden and wife vs. Haley*, 2 Bay 457. Two years afterwards, the same question was brought up again in the case of *Perry vs. Middleton*, 2 Bay 539, where the judges again recognised the doctrine as correct, and said that the question had been settled in several cases, and these cases

have always been considered as setting the law upon the subject. It appears from these decisions that the present plaintiffs might have maintained their action, if the deceased plaintiff had not been joined with them. They are, therefore, precisely in the same situation now as if the action had originally been brought in that form. The cause of action therefore survives to the surviving plaintiffs because they alone might have maintained the action. The decision of the judge below, must be supported, and the motion is therefore refused.

Demurrer sustained.

SHIEL VS. RANDOLPH.

Where the defendant sets up a discount, and pays the balance of plaintiff's claim into court, the plaintiff having refused to receive it before suit, if the jury allow his discount they may find for the defendant, and thereby cause the plaintiff to pay costs.

The plaintiff sued Randolph on a note, who set up a part deficiency in the consideration, and had tendered the balance, after deducting for the deficient article. Plaintiff refused to receive it, and commenced his action. On the trial after the jury had been charged and had left the box, the court permitted the defendant to pay into court the balance he had tendered, and the court sent the clerk's certificate of the payment to the jury in their room. The jury, allowing the defendant's discount for the deficiency, found a verdict for him. The plaintiff appealed.

O'Hanlon, for the plaintiff, moved for a new trial.

Brickell, contra.

CURIA, *per* NOTT, J. (After considering some minor points in the case.) But there is another view of the case, which is well worthy of consideration. The defendant offered to pay the full amount of the note, claiming a deduction to which he thought himself justly and legal-

ly entitled, so that the only question before the court was, whether the defendant was really entitled to that deduction or not. And why may not a defendant in every case where he claims a discount or set off, tender the amount actually due, and pay it into court when the plaintiff refuses to accept, and let the event of the cause depend upon that question. If the defendant succeed, let the plaintiff take the money and pay the costs of the action; if the plaintiff prevail he will of course be entitled to costs. Such a practice is perfectly within the spirit of our discount law, which is intended to prevent a multiplicity of actions. I think it would be attended with convenient and salutary consequences, and I am not aware of any principle of law opposed to it. There is nothing more unreasonable than that a defendant who has succeeded to the whole extent of his defence, should nevertheless be subjected to the payment of costs—and that is really the whole matter in controversy now. The defendant has established his defence, and the question is, whether he shall not pay the costs, which in all probability are equal to the deduction which he has obtained. But in any event, if the jury have decided correctly with regard to the principal question, of which the court will not attempt to judge, justice has been done, and the court will not be anxious to ascertain whether there may not be some technical rule of law by which a new trial can be granted contrary to the justice of the case. But suppose a new trial should be granted upon payment of costs, nothing would be gained but another opportunity of litigating a question, which as far as we can see, has been correctly decided.

New trial refused.

ALEXANDER BEAN VS. ELIZABETH MORGAN.

If the husband depart from the state, for the purpose of a residence abroad, without the intention of returning, such absence renders the wife competent to contract, and to sue and be sued, as if she were a *feme sole*.

This was an action brought upon a note of hand. The defence relied upon was the coverture of the defendant at the time of executing the note. It appeared that the defendant was married in 1817 to Morgan, who lived with her until some time in 1818, when he left this state and went off, and nothing certain had been heard of him since. The case was tried on summary process.

WATKINS, J. who heard the cause, decreed for the plaintiff. The defendant notwithstanding her coverture, was bound by her note to the plaintiff. Her husband Morgan, had left the state to elude his creditors, and as he had not since returned, it was fair to presume that he had no intention to do so, and that he had abandoned her. By being thus deprived of his aid and protection, she was obliged to provide for herself, and was therefore competent to make contracts and to sue and be sued on them as a *feme sole*; otherwise she would have no means of gaining a support. Considering this a plain principle of equity he felt authorised to apply it to a case which was within the equity jurisdiction of the court; and having since looked more fully into the subject, he found the principle was also recognized by the common law. Clancey, in his essay on the Rights of Married Women, p. 7 to 13, had collected a number of authorities relating to it, both at law and in equity, and had drawn from them this conclusion, that "if the husband depart from the realm, for the purpose of a residence abroad, either voluntarily without an intention of returning, or compulsory without the power of returning, such absence renders the wife capable of contracting, and therefore of ability to sue and be sued,

and to acquire and dispose of property, as if she were sole."

Bauskett, for the defendant, cited 1 Com. on Con. 172, 179.

Butler, contra. Clancey 9, 19, 1 Dublin ed.

The court of appeals concurred in opinion with his Honor Judge Waties, and confirmed his decree.

Decree confirmed.

E. B. BENSON vs. Sheriff of Pendleton, vs. JOSEPH T. WHITFIELD, Attorney at Law.

By the act of 1791, Attorneys at Law are made liable to Clerks and Sheriffs for costs, when they commence actions for plaintiffs residing without the limits of the state.

This was an action brought by the sheriff against an Attorney for costs, under the act of 1791, making attorneys liable for costs, when they commence actions for plaintiffs residing without the limits of the state. His Honor Judge Richardson decided that the words of the act, "agents or attorneys," meant *attorneys in fact*, and not *attorneys at law*, and reversed the decision of the magistrate. The plaintiff moved to reverse this decision on the ground that attorneys at law were meant, by the act.

W. R. Davis, for the motion.

Bowie, contra.

CURIA, *per* JOHNSON, J. By the act of 1791 it is enacted "That the several clerks and registers of the courts of justice and sheriffs throughout the state, shall collect and receive their own fees from the different suitors and persons who are liable to pay the same, in the said courts of justice respectively, except where the plaintiffs or complainants reside in foreign countries, or are without the limits of this state, in which case the *agents* or *attor-*

neys of the said plaintiffs or complainants shall be answerable for the said fees, &c."

The lexicographers define the term *agent* to mean, a substitute, a deputy, a factor, and the term *attorney*, one who is appointed or retained to prosecute or defend an action at law—a lawyer; and the vulgar use of them is in accordance with these definitions. So that whether we adopt the vulgar or the grammatical meaning in the construction of the act, the defendant is liable. The evil, against which this act was obviously intended to provide, was the inconvenience and injustice suffered by resident defendants, when there was no one within the jurisdiction of the court who was responsible for the costs, and if that responsibility is confined to agents or attorneys in fact, the object of the act would be easily defeated by an omission on the part of the plaintiff to constitute such an agent. Indeed he would have no motive to do so, as his attorney could discharge all the duties without such responsibility. The legislature must have been well aware that the office of an agent or attorney in fact was not indispensably necessary to the prosecution of a suit; and appear to me to have introduced the word *attorneys* to cover the very case under consideration; and if we adopt the spirit of the act as the rule of interpretation, the liability of the defendant is equally established.

Decree reversed.

PETTERS VS. PETTERS.

Testator in the first clause of his Will, devised his mansion house and the lands attached to it to his wife during her widowhood; in the 8th clause he gives his grandson the same premises with an additional quantity of land, in fee simple. Held that the latter clause was not inconsistent and did not revoke the former, but that the grandson took a fee subject to the use during widowhood to the wife.

Samuel Knox, of North Carolina, in the first clause of his will says "My widow to remain and enjoy this my mansion house and farm during her widow hood." In the 8th clause he says, "To my grandson Samuel Knox Petters, son of William Petters, I bequeath the plantation whereon I now live, and as much in the south state joining this tract, as will make this tract 800 acres, with all the improvements and appurtenances thereunto belonging forever." The defendant S. K. Petters, contended that as the clauses were inconsistent, and the devise to him in fee of the mansion house and premises was contained in the latter clause, that it revoked the previous devise to the wife during widowhood. His Honor Judge Gaillard charged the jury otherwise, and they found a verdict for the plaintiff. The defendant appealed.

Clendenin, for the appeal.

Williams, contra.

CURIA, per JOHNSON, J. The rule of law that when two clauses in a will are so totally repugnant to each other that they cannot both stand together, the last shall prevail, which is made the ground of this motion, is incontrovertible; but it was never intended to apply to every imaginary incompatibility which ingenuity might suggest. The salutary maxim, *ut magis valeat quam pereat* would induce us to make an attempt to reconcile them before we applied the rule. If in the interpretation of this will, we call into our aid the universal rule, that the intention of the testator is to be collected from the whole will taken

together, and from the obvious meaning of the words used, it is apprehended that the seeming incongruity will disappear. In the first clause the testator devises the use of his mansion house and farm to his widow during her widowhood, and in the eighth he devises the same with other lands to the defendant in fee; now let it be recollected that the several clauses constitute but one expression of the will of the testator, and that the first was in his eye when the 8th was penned, and let it be asked, what did he intend? If these two clauses were read together you have the answer; to his widow he gives the use for a limited time, and to the defendant the fee simple. These estates may exist together, and are found in all the relations of landlord and tenant, and in the innumerable trusts that are daily created by deed or operation of law. There is then no incompatibility nor repugnance in these clauses. An experienced clerk would probably have in the devise in fee reserved the use, but we well know that for the most part, and especially in the country, wills are drawn and executed without the aid of counsel, and to require that they should be dressed up with technical precision, would be to deny the good people the right of disposing of their property by will.

New Trial refused.

TILLINGHAST & ARTHUR VS. THOMAS CARR.

By the Constitution of the State, members of the Legislature are privileged from being *arrested* during the sitting of the Legislature, and ten days previous and subsequent thereto. The provision of the Constitution is not confined to cases of bail processes but extends to all suits.

The defendant being a member of the Legislature, and indebted to the plaintiff, the plaintiff issued a writ against him, which was served on the defendant, in Columbia, whilst he was attending the legislature. A motion was

made before his honor Judge *Gantt*, at the sitting of the court to set aside the service of the writ, on the ground that the service was void under the constitutional provision which declares that "the members of both houses shall be protected in their persons and estates during their attendance on, going to and from the legislature, and ten days previous to the sitting and ten days after the adjournment of the legislature. But these privileges shall not be extended so as to protect any member who shall be charged with treason, felony, or breach of the peace."—His honor ordered the service to be set aside, and this was an appeal from his judgment.

O'Neill, for the motion.

Gregg, contra.

CURIA, *per* COLCOCK, J. In determining this question I must be governed by the words of our constitution. It will be observed that all cases of privilege are now provided for by some law, and in most of those which have been passed on that subject, both here and in Great Britain, (before the act of Ann,) the word arrest is used; and the construction which has been almost always given to that word, has been, that if the body be not taken, the privilege is not violated. There can be no doubt but that the framers of our constitution were fully apprised of the various opinions on this subject and of all the important cases which had occurred in England, and that after a full knowledge of these circumstances, they passed the clause of the constitution. Now if the framers of our constitution meant no more than that the members should be exempt from arrest, why did they not use that word so common on such occasions. With respect to those who act in a lower sphere of public importance, it is the exemption which is afforded by our acts. I think the convention intended to exempt members from the time mentioned, from all suits whether by arrest or summons:

and although it may appear at the first blush that this privilege is too extensive, yet I think that it is supportable both on reasons of policy and justice. And as to the law of England on that subject, it is clear from a view of the statute of William III. that a member of parliament cannot be sued while in the discharge of his duty; and whatever may have been the origin of that doctrine, or however extensive it may have been in the early ages of that country, it is now put on the same ground of public policy and justice to the individual. In the case of Bolten and Marten, 1 Dallas 302, Justice Shippen gives an admirable commentary on the law of England, and particularly on the statute of William. He says, "I think no authority will be wanting to shew what the law was on the subject before the passing of this act. From the whole frame of that statute it appears clearly to have been the sense of the legislature, that before that time members of parliament were privileged from arrest and from being served with any process issuing out of the courts not only during the sitting of parliament, but during the recess within the time of privilege, which was a reasonable time, *eundo et redeundo*. The design of the act was not to meddle with the privileges which the members enjoyed *during* the *sitting* of parliament, (those seem to have been held sacred,) but it enacts that after the dissolution or prorogation of parliament, or after adjournment of both houses, after the space of fourteen days, any person might commence and prosecute any action against a member of parliament, provided the person of the member be not arrested during the time of privilege. The manner of bringing the action against the member of the house of commons, is directed to be by summons and distress infinite, to compel a common appearance. But even this was not to be done till after the dissolution, prorogation, and adjournment. And he further remarks that this construction, which is

an obvious one, accounts for the seeming doubt in Col. Pitt's case, in *Strange*, whether he should be discharged on common bail or altogether. It being after the dissolution of parliament, the plaintiff had a right by the act, to sue him, and therefore it seemed at first that he should only be discharged on common bail, but as he had commenced his suit by arresting his person before his time of privilege expired, the judges discharged him entirely.—It is then clear that the law as stated by the plaintiff's counsel is incorrect.

It must be obvious that a member may be much harrassed by suits, although his body be not arrested. His mind must of course be greatly disturbed and drawn off from his business ; besides it brings upon him a sort of odium which lessens his usefulness. If it be admitted that he may be served with summons while attending on the legislature, it follows as a matter of course, that he may be served with summons *eundo et redeundo*, and thus he might, by illnatured and malicious creditors, be sued in every district through which he passed, going or returning, and might be required to attend a court which might be sitting while the legislature was convened, and thus perhaps an undue advantage be taken of him. He might be served with a process within the inferior jurisdiction of a court, in or near its sitting. But at all events he is compelled to attend a court at a distance from his home, at great expense and inconvenience, a hardship which he ought not be put to in the discharge of a public duty. And it may be asked in the last place, where is the necessity for it? Justice is as speedily rendered in one part of the state as another. If the individual had remained at home his creditor would have been bound to follow him. The motion is discharged. The judgment of the court below is affirmed.

Motion refused.

J. B. RICHARDSON VS. GEORGE DUKES.

The defendant shot the plaintiff's slave while he was stealing potatoes from a bank at night, and killed him. The court held the defendant liable for the value of the negro, and granted a new trial, the jury having found a verdict for one dollar.

In assessing damages where property is in question, the value of the article as nearly as it can be ascertained, furnishes a rule from which the jury are not at liberty to depart.

This was an action of trespass for killing the plaintiff's slave, tried before judge Richardson, at Sumter, Fall Term, 1816. It appeared in evidence that the defendant discovered two negroes stealing potatoes from a bank which he had put up near his house; he shot at them with a gun loaded with buck shot, and killed one of them belonging to the plaintiff. The evidence was, that he was a negro of bad character. The jury found a verdict for the plaintiff for one dollar.

This was a motion for a new trial on the ground that the jury were not justified in finding a verdict for less than the real value of the negro.

J. G. Holmes, for the motion, cited *Arthur vs. Wells*, 2 Const. Rep. 314; *Witsell vs. Earnest*, 1 Nott & M'Cord 182; *Porteus vs. Hasell and Jenkins*, Harper's Law R. 333; *Wise vs. Freshly*, 3 M'Cord 547.

Wm. F. DeSaussure, contra.

CURIA, *per* NOTT, J. In the course of the argument the verdict has been attempted to be supported on the ground that there were certain runaway negroes in the neighborhood at the time this occurrence took place, who were committing murders and other outrages, which kept the country in such a state of alarm as justified the defendant in shooting under the particular circumstances of the case; that he had not therefore committed any trespass for which he was answerable, although the death of the negro was the consequence. I do not know but instances might occur where runaway negroes may become

so dangerous that every person in the community might be considered as acting on the defensive against them, but even in such a state of things, a person must take care that he does not mistake his object. No such state of alarm existed in this instance, nor was there any evidence to that effect. The defendant himself did not pretend that he acted from any such motive. He acknowledged that he did not know the negroes, but that he nevertheless shot with a determination to kill, "for he was determined to kill every rascal that came inside of his plantation." It was not then because he was under any state of alarm, or that he apprehended these persons to be of dangerous character, but it was in pursuance of a resolution which he had taken, to kill every one that he found thus trespassing upon him. It is true it turned out in evidence, that this was a negro of bad character; but still he was entitled to the protection of the law, and his owner to the value of his services. It is only in the latter point of view that the case is now to be considered. Being of bad character unquestionably lessened his value, and it might therefore be considered in mitigation of damages; but it was no justification. The jury were not at liberty therefore to let the defendant off with merely nominal damages. They were bound to give the plaintiff the value of the property, whatever it might be. In cases sounding altogether in damages, such as slander, malicious prosecution, and the like, which furnish no data for the estimation of the damages the jury are left in a great measure without any controul. But where property is in question, the value of the article, as nearly as it can be ascertained, furnishes a rule from which they are not at liberty to depart. *Wallis vs Frazier*, 2 N. & M'C. 516. They may, to be sure, in wanton and malicious trespasses, give what are sometimes called vindictive damages, beyond the real value of the property. They are however

{ not at liberty, directly contrary to the evidence, imperiously to give any arbitrary sum, below its value, as they may think proper. The verdicts of juries, though always well intended, are often the result of momentary feeling, and the tenure of property would be very precarious if it were to depend upon such hasty and fleeting impressions. There is no principle upon which this verdict can be justified, and the motion for a new trial must be granted.

New trial granted.

M'CLURE VS. SUTHERLAND.

Where a verdict has been found in favor of one of several joint defendants, he is entitled to have his costs. But where the costs have been joint, as a joint appearance, plea, subpoena, &c. he is only entitled to half costs.

But if a particular expense has been incurred, as if a witness has been examined by commission for him alone, the defendant acquitted will be allowed full costs for such items.

This was a suit brought against Sutherland and one Lynch. On the trial a verdict was found against Lynch, but in favor of Sutherland: The appearances, pleas, and subpoenas were joint, one attorney acting for both. The question was whether Sutherland was entitled to have his costs. The clerk refused to tax any costs for him, and this was a rule on him to shew cause.

HUGER, J. who heard the cause, made the rule absolute, with directions to the clerk to allow only half costs. Sutherland appealed.

Bowie and *Burt*, for the appeal. Costs in this state are not divisible. They must be allowed or refused in toto. By the authority of *Trapp vs. M'Kenzie*, 2 Nott and M'Cord 571, Sutherland was entitled to have judgment for all his costs in the cause.

CURIA, *per* JOHNSON. The County Court Act contains a provision, that if a verdict shall be found for one of sev-

eral defendants, he shall have costs against the plaintiff. And although this act was not imperative on the Circuit Courts, the principle of it seems to have been incorporated in the practice in those courts, and is sanctioned in the case of Trapp vs. M'Kenzie. Where the costs must from their nature be joint, such for instance as the cost of a joint appearance or plea, or when witnesses have been summoned on account of the joint defence, the rule laid down by the presiding judge for their apportionment, furnishes the only practical mode, and is clearly correct.— But if it can be shown to the satisfaction of the clerk, that a particular expense has been incurred by the individual defence of the successful defendant; as for example when witnesses have been summoned or examined by commission, on account of his defence alone, and unconnected with the joint defence, it comports with the justice of the case and the spirit of the practice, that he should be allowed this as a separate charge. The motion is therefore granted, and the clerk is directed to tax the costs in conformity with this opinion.

Costs ordered to be taxed.

FOSTER vs. FLOYD.

A note under seal is not negociable, but must be assigned according to the provisions of the act. 1 Brev. 91.

STATE vs. HOWARD.

In cases of perjury two witnesses are required, as well to prove the facts sworn to, as the falseness of the oath.

FARMER VS. FREY.

Where a case has been referred to arbitrators by consent of parties, and before the award is confirmed, one of the parties die, the case abates, and it is too late to confirm the award.

This case was referred to arbitration by order of court, with consent of parties. The award was made and returned to the court, and the plaintiff was allowed until the succeeding court to show cause against its confirmation; and before the award was confirmed the defendant died. A motion was made to enter up judgment on the award nunc pro tunc, but Huger, J. who tried the cause refused the motion on the ground that the death of the party before confirmation, abated the suit.

Miller, for the motion.

Williams, contra.

CURIA, *per* NOTT, J. This is a new question, and has been submitted without argument or authority, and I have not been able to find any case having a direct application to it. My first impression was that the order ought to have been granted. But a little reflection has led me to a different conclusion. They have no authority in the courts to order rules of reference in cases pending before them. It is a practice introduced by the parties, to which the court lends its sanction, but it can only be done by consent; it is therefore only an act of the parties, and not of the court, and cannot be considered as any part of the record, until the award is returned and confirmed by the court. If either party dies in the mean time, the suit abates, and the award is gone. There is no record on which it can be founded, and although it may be good, as an award it cannot be made a judgment of the court. I am of opinion therefore, that the decision was correct, and the motion ought to be refused.

Motion refused.

JENNINGS VS. FUNDEBURG.

To excuse a trespass on the ground of accident, it must appear to have occurred without the least fault on the part of the defendant.

Where defendant was in pursuit of runaway negroes who ran from him, and he fired his gun towards them, intending to shoot over their heads, to induce them to stop, and one of the negroes was killed by a random shot, the court held the owner of the slave was entitled to recover his value, as the accident did not occur without fault on the part of the defendant.

This was an action of trespass for killing the plaintiff's slave, tried at Orangeburgh. The defendant in this case was one of a party who went in search of some runaway negroes who had been very mischievous in the neighborhood. They were surprised in their camp, and as they fled the defendant fired towards them, and soon after, one of them who belonged to the plaintiff, was found dead. As the firing by the defendant was proved only by his own acknowledgements, his whole statement was received in evidence, and he declared he had no design to hit any of the negroes, but had fired his gun only to intimidate and induce them to surrender. That he was at first so near that he might have killed any of them if he wished it, but had deferred firing until they had fled some distance, when his view of them was intercepted by trees, and that he had then directed his gun considerably above them. This last fact was confirmed by one of the witnesses who saw where the load had struck in the boughs of the trees, and was of opinion that the negro must have been killed by a random shot which had been turned out of its direction. There was only one wound found on him, and this was on the back of his head and appeared to be given by a single buck shot.

WATIES, J. who tried the cause thought, under these circumstances, (if they were true,) that the killing was accidental, and that the defendant ought not to be made answerable as a trespasser. Such a killing would on a

criminal prosecution be regarded as an excusable homicide; and although an act which is not criminal, may if injurious to property, entitle the owner of it to compensation, yet the injury must ensue from some unauthorised intermeddling with the property; as in the case of *Wright vs. Gray*, 2 Bay 214, where the defendant prevailed on a negro boy without the consent of his master to ride a race and the boy was thrown from the horse and killed. But when one is lawfully interfering with the property of another and accidentally injures or destroys it, he is no trespasser and ought not to be answerable for the value of the property. In this case the defendant was engaged in a lawful and meritorious service, and if he really fired his gun in the manner and for the purpose stated by him it was an allowable act; but his honor left it to the jury to judge whether it was such an act, and they were told that if they took a different view of it, and could see any thing in it which showed an intention to kill or injure the negro, they were bound to find a verdict for the plaintiff.

The jury found for the defendant, and the plaintiff appealed.

Felder, for the motion.

Preston and Butler contra.

CURIA, *per* JOHNSON, J. The fact that the defendant killed the plaintiff's slave is not controverted, and *prima facie* an action lies against him. He has not justified, but attempted to excuse it as the result of an accident, and the question is whether that excuse is made out according to the rules of law? To excuse a trespass on the ground that the injury done was the consequence of an accident, it is not enough that the party did not intend it, but it must appear that it was unavoidable and without any the least fault on his part; and the books go so far as to say that if by an extraordinary degree of circumspection, even greater than is ordinarily practised in the affairs of

life, he might have guarded against it, he shall be liable: which is illustrated by a case where to an action for an assault and battery, the defendant pleaded that the plaintiff and himself were soldiers at exercise skirmishing with their muskets, and in so doing the defendant casualiter et per infortunam et contra voluntatem suam in discharging his piece wounded the plaintiff. On demurrer the plea was held bad, for say the court, a man shall not be excused a trespass except it has been committed utterly without his fault. *Hammond's N. P.* 67. . Going in pursuit of runaway negroes was not only justifiable but laudable in the defendant, and the act of firing his piece merely for the purpose of intimidating and inducing them to surrender was in itself harmless enough, and the circumstances I think justify the finding of the jury that the killing was not intentional; but according to the rule this is not enough to excuse the defendant, he must appear blameless.

The fact that the negro was killed is in itself a strong circumstance going to show a want of proper care on the part of the defendant. Those accustomed to the use of fire arms know that shot discharged from a gun take an exceedingly wide range, and are turned out of their direction by the most trifling and unsubstantial obstruction. To have fired therefore in the direction in which the negroes, and especially when they were out of his view, and when it was uncertain whether the gun might not have been bearing on them, was not only incautious but rash in a high degree, and according to the rule rendered the defendant liable. A new trial is therefore granted.

New Trial Granted.

CHILES vs. HOLLOWAY.

The Sheriff is not liable for money received by his Deputy, on a case in which execution has not yet been lodged in his office.

This case had been referred to the clerk, on an order for judgment, but judgment had not been entered, nor any *fi. fa.* issued, when the defendant paid to one Tutt, the deputy of Belcher the sheriff, who gave a receipt in the case as deputy sheriff, the sum of \$170 dollars, and this was a rule upon the sheriff to shew cause why he did not give credit on the execution for the amount which it appeared Tutt had not paid over. The sheriff objected to the rule on the ground, that he was not responsible for a payment made to his deputy, until execution was lodged in his office for collection. That until execution was issued and lodged with him, he had no authority for receiving payment, and of course his deputy had no authority.

WATIES, J. who heard the case dismissed the rule.— He thought the sheriff had no authority to receive the money but what he derived from the execution, and that a payment made to the deputy before the sheriff himself was authorised to receive it, could not render the sheriff liable. The party paying must look to the deputy.

The Court of Appeals confirmed his honor's judgment.

Rule dismissed.

STATE VS. STEPHENSON.

Perjury may be assigned on an oath administered by a justice of the peace, on the investigation of a matter submitted to arbitrators by a rule of court with consent of parties.

The only question in this case was whether perjury could be assigned on an oath administered by a justice of the peace, on the investigation of a matter in dispute submitted to arbitration by a rule of court with consent of parties. The prisoner demurred to the indictment, and JAMES, J. supported the demurrer.

Earle, Sol. appealed on the part of the state and moved to reverse the judgment of the circuit court. He cited *State vs. M'Croskey*, 3 M'Cord 308. 1 Haw. P. C. 318. Kydd on Awards 87. 95. 1 Bos. and Pul. 91.

Burt, contra. This was a voluntary oath. It could not constitute perjury. It was not in a course of judicial proceeding. The parties could not confer on the arbitrators this judicial capacity. An oath taken before a committee of the House of Commons has been held not to be an oath taken in a course of justice.

Earle, in reply, cited 1 Haw. 319. 320.

CURIA, per JOHNSON, J. This question was incidentally noticed in the opinion of the court delivered by myself in the case of the *State vs. M'Croskey*, 3 M'C. 308, in which the intimation of an opinion that perjury might be assigned on such an oath is thrown out, and subsequent reflection has fully satisfied me of the correctness of the observation. Mr. Russell in his *Treatise on Crimes*, 2d vol. p. 1751, defines perjury to be, the taking of a false oath by one, who being lawfully required to depose the truth in any proceeding in a court of justice swears falsely, in a matter of some consequence to the matter in question. But it is evident that this definition, so far as it regards the tribunal or authority before which it is taken,

is too limited; as it would tend to exclude all affidavits and depositions taken out of court, however necessary they might be to the administration of justice. Serjeant Hawkins and Chief Baron Comyn are the authorities relied on for this definition, and upon referring to these authorities it will be seen that the word *court* has been substituted instead of the word *course*, originating probably in a typographical error, (Vide 2 Haw. P. C. 315. ch. 69. Com. Dig. Tit. Justice of the Peace, B. 102,) and it follows that perjury may be assigned on any false oath taken before a person duly authorised to administer it, in a *course* of justice. But they all agree that perjury cannot be assigned on any oath taken before persons acting in a mere private capacity, or before those who take upon themselves to administer an oath of a public nature without legal authority; nor even where it is administered under the color of authority, and it is in truth unwarrantable and void. Of this class are all oaths which are merely voluntary, and from which no legal consequences are to follow. 2 Russell on Crimes 1756.

The authors before cited have collected a great variety of cases calculated to mark the line of separation between that class of oaths which, with respect to the tribunal by which they are administered, constitute the crime of perjury, and those which do not; and without entering into a minute analysis of them, all the principle clearly deducible from them is, that whenever the law confers the power of ascertaining facts, and from which any legal consequences are to follow, and in the investigation of which the examination of witnesses are necessary, it is perjury in a witness to testify falsely. In order to come at the correct application of this principle to this case, it will be necessary to ascertain with some degree of certainty the powers and legal character of arbitrators, sitting in judgment in a matter referred to them by the act of the parties,

and the consequences which follow their judgment. The right of parties to refer matters in controversy to the judgment of private individuals, has never been denied. Judging from probabilities and calculations, from the ordinary progress of human society, it may be concluded that this mode of settling controversies followed the laws of force, and preceded any regularly constituted system of jurisprudence. At any rate it has existed as far back as we can trace the history of our own. And our courts of justice have invariably held their awards as conclusive as to the rights of the parties ; and unless impeached for fraud or partiality, they are, in law, as obligatory on the parties as the judgment of a court in the last resort, and with the exception of the want of the power of enforcing them, must be regarded as equally authoritative. A practice in strict conformity with that adopted on the reference stated in the indictment, is now invariably prevalent in this state.

When a matter is referred by the parties to arbitration, the attendance of a Magistrate is procured, who administers the appropriate oath to the witnesses who are examined ; and this usage has, it is believed, been handed down from the first settlement of the country. In this state, at an early period, the mass of the population was concentrated in and near the city of Charleston, and the courts of justice were principally situated there, and were in some degree inaccessible to the scattered population of the interior, and a resort to these domestic quasi tribunals was their only resource, and hence the uniformity and inveteracy of the usage.

It is objected however that this is not a judicial tribunal, and that therefore perjury cannot be assigned on a false oath taken before it. According to the principle before laid down, it is not indispensable that the power should be exclusively judicial. It is sufficient that they are by

law invested with the power of ascertaining facts by the examination of witnesses, which may be illustrated by the common cases of affidavits made before a magistrate, in relation to some proceeding to be instituted in a court of justice ; as to hold a defendant to bail, to effect the continuance of a cause depending, and the like. In these cases the justice has no power over the subject. The act is merely ministerial and ancillary to the administration of justice. But yet perjury may be assigned on such an oath, and the reason given is that it is calculated to mislead the court in pronouncing its judgment. And it is contended by Sergeant Hawkins, and I think with great force, that a false oath taken before persons authorised by the King to examine witnesses, in any matter whatsoever, touching his honor or dignity, are such that perjury may be assigned on them. Again, the law acting upon the contract of the parties, authorises the arbitrators to determine the matters in dispute, their judgment is conclusive, and the courts of justice enforce them. Perjury is calculated to mislead them, and of course the courts of justice, and in this respect the principle which renders a false oath perjury, which is ancillary to the administration of justice, equally applies. It is objected also, that the magistrate has no authority to administer the oath. Very many of the powers which belong to the judicial as well as ministerial officer are derived from the common law, the creature of usage, and there is none better sanctioned than this.

The case of *Chapman vs. Gillet*, 2 Conn. Rep. 40, on which I have drawn so largely in the case of the *State vs. M'Croskey*, contains a principle which I think is sustainable on the clearest principles of sound reasoning, and which is assented to by the minority of the court—it is, that when an oath is administered in the course of a proceeding sanctioned by the express enactment of the legislature, or by the common consent and usage of mankind,

and from which a temporal loss to any one arises, it is perjury to swear falsely. The question in that case was whether it was perjury to swear falsely in a matter concerning the government and discipline of the members of a church; and the opinion of the court proceeds on the ground, that inasmuch as the party concerned might in the event be excluded from voting, that it was perjury; and the minority appear to admit the principle but deny that the consequences would follow, and claim for the law tribunals the power of passing on the right of the party to vote. The application of this principle to the case under consideration is obvious. There the oath was administered under an authority sanctioned by common consent and immemorial usage. It directly affected the temporal interest of the party in a manner as conclusive as the judgment of a court of justice. In morality the offence is as great, whatever may be the character of the tribunal, and its effects and legal operation in the particular case are nearly the same.

Demurrer overruled.

HOUGH vs. EVANS.

The concealment of a circumstance, which materially impairs the value of an article sold, is fraudulent, and though the vendor at the time of sale refused to warrant the soundness, yet the vendee may recover in an action of deceit.

Defendant sold plaintiff a slave, and gave him a bill of sale warranting only the title, and at the time of giving him the bill of sale, he absolutely refused to warrant the soundness of the slave. It was proved that the negro was unsound at the time of sale. He had a chronic consumption attended with a bad cough. At the sale, which was at vendue, where defendant sold all his slaves, the defendant said to one witness that the negro was sound, that

he had only a cough, as all his other negroes had. It was declared at the sale that the defendant would not warrant any of the negroes or that any of them would live another day. Plaintiff was heard to say after the sale that he had bought a dead or sick negro, but that he could cure him with bacon. The price paid was \$482, the value if sound. This was an action of deceit.

WATIES, J. who heard the cause, charged the jury, that if the defendant, by representing an apparent unsoundness to be trifling, knowing it to be otherwise, had thereby induced the plaintiff to give a sound price for the property, that it was fraudulent, and though he had declared that he would not warrant, yet it ought not to avail him.

The jury found a verdict for the plaintiff.

The defendant appealed.

Wardlaw for the motion, cited Peake's N. P. 115. 1 Esp. Dig. 40. *Bernard vs. Yates*, 1 Nott and M'Cord 142. *Rogers vs. Beaty*, 2 Nott and M'Cord 531.

Butler in reply, cited *Slyke vs. Greenway and Gorree*. *Wells vs. Fowler*. 1 Black. R. 465. 2 P. Wm. 170. *Douglass* 260. 1 Term R. 12. *Bliss vs. Thompson*, 4 Mass. R. 488. *Hodgson vs. Richardson*, 1 Black Rep. 465. *Fitzherbert vs. Martin*, 1 Term. R. 12.

CURIA, *per* JOHNSON, J. In the consideration of this case it will be assumed as conclusions necessarily resulting from the finding of the jury, and warranted by the evidence, that the price paid for the negro James, was his full value if he had been sound. That the defendant *expressly* refused to warrant his soundness, that he was at the time labouring under a confirmed consumption which was known to the defendant, but which he did not communicate to the plaintiff, and which was unknown to him and not readily detected, and that James died shortly after of that disease; and the question is whether under

these circumstances the plaintiff was entitled to recover? Or to put the mere abstract proposition, whether the seller is not bound to disclose to the purchaser any latent defect in the article sold if it is known to him?

The principle on which those proceed who maintain the affirmative of this proposition is that fraud vitiates all contracts, and they contend that the concealment of a circumstance, which materially impares the value of the thing sold, furnishes as conclusive evidence of the fraud as a direct and positive affirmation of that which is not true, and that in morals he who suppresses the truth is equally criminal as he who states a falsehood, and such I think is clearly the well settled rule on the subject.

In *Hodgson vs. Richardson*, 1 Black. Rep. 465, Mr. Justice Yates lays it down broadly, "that the concealment of material circumstances vitiates *all contracts* upon the principle of natural law," and adds "that a man kept ignorant of any material ingredient may safely say it is not my contract."

So in the case of *Mellish et. al. vs. Motteaux et. al. Peake's Case* N. P. 115. (cited 2 Comyn. on Cont. 273,) which was an action to recover back the price paid for a brig, which the plaintiffs had purchased *with all faults*, and it was afterwards discovered that some of her timbers were broken, which materially impaired her value and which was known to the defendants but not disclosed and which could not have been readily discovered by the plaintiffs. Lord Kenyon remarks that in all contracts of this kind it is of the highest importance that courts of law should compel the observance of honesty and good faith, and that the terms to which the plaintiffs acceded, of taking the ship with all faults and without warranty must be understood to relate to those faults only which the plaintiffs could have discovered, or which the defendants were unacquainted with. The same doctrine is also

held by Lord Mansfield, in *Fitzherbert vs. Mather*, 1 D. and E. 12. But it is no where better expressed than by Chief Justice Parsons in *Bliss et. al. vs. Thompson*, 4 Mass. Rep. 488, which was a fraudulent concealment in a contract relating to lands in which that able judge remarks, that "not only good morals but the common law requires that every man in his contracts should observe good faith and act with common honesty; and money obtained by fraudulent concealment or false representations the law will compel to be paid to the party to whom in equity and in good conscience it belongs.

The doctrine of the civil law in relation to implied warrantees has by successive adjudications been adopted and incorporated as part of the common law of this state, and is regarded in the same light that an express warranty would be by the common law as now received and understood in England. But it is not contended that the case under consideration falls within the rules growing out of either of those systems, nor that a seller may not by an explicit refusal to warrant exempt himself from liability if he acts with good faith, as in the case of *Slyke vs. Greenway and Goree*, decided in this court. And the question in this case is not whether the defendant is liable on a warranty either expressed or implied, but whether he has committed a fraud in the sale, and if he has, whether it be referred to principle or authority he is clearly liable.

But it may be asked shall a man not be permitted to protect himself from liability by express and positive stipulations, and is not the other bound by his assent to those terms?

In England every sale without warranty contains in effect a stipulation on the part of the seller not to warrant, and of the purchaser to accept without warranty; and we have before seen that the doctrine contended for applies

to those cases; and a summary answer may be found in the principle that fraud vitiates all contracts, may also be safely laid down as an axiom that fraud cannot be purged by any stipulation; for put it on the best possible footing, it is only a fraudulent stipulation to cover a fraud.

In addition to these general remarks it may be observed that there is one circumstance in this case that strengthens the claim of the plaintiff. The general appearance of the negro James did not indicate to the eye of a common observer the presence of the disease, and on enquiry made by one of the witnesses, defendant represented to him that he was sound and although he had a cough it was of a common kind and that all his other negroes were in the same situation. Now, although it did not appear that this came to the knowledge of the plaintiff and ought not therefore to be set down as a fraudulent misrepresentation to him, yet when it is recollected that the negro was sold at public vendue, we may, I think, be permitted to collect from it a disposition on his part to commit a fraud on whomsoever might be the purchaser, and which he too successfully practised on the plaintiff.

The majority of the court concur with the presiding judge in all the views taken by him of the case, and the motion is refused.

Norr, J. dissenting. I concur with the presiding judge in the principles of law laid down by him. But I do not consider them as applicable to this case. The defendant made a sale of the principal part of his property at public auction, the terms of which were that he would warrant the title but nothing else. The terms were proclaimed by the crier from the stand, and were repeated by the vendor to every person who consulted him on the subject. There was no pretence that it was a mere factitious sale, in order to put off his unsound property. That is an inference attempted to be drawn from the fact that there

was one unsound negro in the gang. But this was an action of deceit in which fraud was not to be presumed, but should have been proved. It is said the defendant was bound to disclose the defects of the property. But I am not aware of any rule of law which requires the vendor unasked, to disclose the defects of property offered for sale when he expressly declares that he warrants nothing but the title. It is to be sure in proof, that he told one individual that the negro was sound, except that he had a cough, as all his negroes had. Now let us admit that he was guilty of a misrepresentation to that person—it would give no cause of action to the plaintiff, because he was no party to the false affirmation. But there is no proof that the defendant knew it to be false. The witness, and I believe only one, said that the negro had a cough sometime previous to the sale, and spit blood. But that is no conclusive evidence of a fatal malady—and there is no evidence that the defendant even knew the fact, and much less that he knew or supposed that it would eventually turn out to be a mortal disease. But to place the case on the most favorable grounds for the plaintiff, it will amount to nothing more than expressing an opinion that the negro was sound, but still declining to warrant him to be so.

I am of opinion therefore, that the plaintiff purchased at his own risk, and if he has made a bad bargain, he must charge it to his own imprudent conduct, and not to the defendant.

New Trial refused (a)

(a) See Mr. Verplank's Essay on Contracts.

LOKER VS. ANTONIO.

In debt on bail bond, the plaintiff in his declaration must set out the condition, the proceedings against the principal, and the particular breaches.

It is not enough to set out the condition, the writ, and the return thereof, and to assign as a breach that the defendant did not appear; the plaintiff should allege that he had prosecuted his writ to judgment, and had issued a ca. sa. to which there had been a return of non inventus, and that the defendant in the original action had not paid the debt, costs, and charges, or any part, nor rendered his body.

Bail bonds are given to the sheriff and his successor, and may be assigned by the successor.

This was an action of debt on a bail bond, brought by the plaintiff as assignee of the sheriff. The plaintiff declared on the penalty alone. The defendant demurred on the ground that the declaration should have set out the condition of the bond, the proceedings against the principal, and the breaches of the condition, as in the English precedents on recognizances of special bail.

JAMES, J. who tried the cause supported the demurrer. The plaintiff appealed, and moved to reverse the judgment.

M'Clintock, for the appeal, cited 4 Dallas 436; 1 Chitty's Plead. 415, n (2.) *Ethersey vr. Jackson*, 8 T. R. 255; 1 Saund. 58; 4 John. R. 214, n (a.) 3 Ld. Ray 256. 8 Morgan's Vade Mecum 391; 1 Nott & M'Cord 64.

Gregg, contra, cited 1 Chitty Plead. 354; Com. Dig. Plead. W. (2) 10; 1 Wilson 284; Arch. Plead.; 2 Cro. 46; Willes 19, note (a.) *Bridge vs. Ford*, 4 Mass. 641; *Bryce vs. Martin*, 1 N. & M. 65.

CURIA, *per* COLCOCK, J. The common law on the subject of bail has been modified in this state by statute. The act of 1809 directs, "That in all actions hereafter to be brought wherein the defendant or defendants shall be held to bail, by the sheriff serving the writ or process, the bail so given to the sheriff shall be entitled to all the rights, privileges and powers of special bail; and may sur-

render his principal in discharge of himself, or the principal surrender himself in discharge of his bail, in the same manner and to the same extent as special bail, (meaning bail above, or bail to the action,) are now entitled to; any law usage or custom to the contrary in any wise notwithstanding; and that it shall not be necessary hereafter for bail to obtain a judge's order for leave to surrender his principal." 1 Brev. 55.

Though the mere nonappearance then of the defendant in the action does fix the bail, yet he may be discharged by a surrender or payment, as bail above at the common law could be. It then becomes necessary that he should be declared against in the same manner as if he had become bail by recognizance. It is the effect of the act of 1809, after the bail has become liable to pay the defendant by the nonappearance of the principal.

Judgment affirmed, and leave given to amend.

At the next sitting of the Court of Common Pleas, this case came on again for trial. In his amended declaration the plaintiff professed to set out the proceedings, but he merely set out the writ and the return, and assigned as a breach, that the defendant did not appear. To this declaration the defendant also demurred, on the ground that the plaintiff had not shewn any cause of action. The demurrer was supported, and the plaintiff again brought up the case.

M'Clintock, for the appeal.

Gregg, contra.

CURIA, *per* NOTT, J. The demurrer in this case admits the truth of every allegation in the declaration. That is to say, it admits that the plaintiff sued out a writ against him, that the defendant became bail for his ap-

pearance at court, and that he failed to appear according to the requisitions of the writ. And the question now is whether upon that statement of facts the plaintiff is entitled to recover. In order to determine that question it is necessary to advert to the acts of the legislature on the subject.

The act of 1785, declares, that whereas heretofore it has been the law of this state that upon the return of writs of *capias ad respondendum*, where the defendant or defendants maketh default of appearance, to suffer the plaintiff to suspend the proceedings against such defendant or defendants, and commence original actions against the bail whereby the costs have been greatly and unnecessarily increased, and the defendant aggrieved—for remedy whereof, be it enacted, That where any writ shall issue from any court within this state whether of supreme or inferior jurisdiction, and the defendant shall give bail for his appearance and shall make default the suit shall be prosecuted to judgment, and execution shall issue against such defendant before any proceedings shall be had against the common bail. P. L. 368.

By the act of 1809, 1 Brev. 55. it is enacted that the bail given to the sheriff shall be entitled to all the rights, privileges and powers of special bail, and may surrender &c. in the same manner and to the same extent as special bail are now entitled to. This last act gives to the bail to the sheriff all the effects, creates the same liabilities, and allows all the privileges of a recognizance of special bail in England. It appears to me therefore, that every allegation which is necessary to show the liability of a defendant on a recognizance of special bail, is necessary to show a liability on the bail bond to the sheriff under our act. But it is unnecessary to look beyond the act of 1785, to determine the case now under consideration. That act expressly declares that although the defendant

shall have made default of appearance, the suit shall be prosecuted to judgment; and execution shall issue against the defendant, before any proceedings shall be had against the bail. It is not therefore the failure to appear that gives the plaintiff a right of action. For unless he should proceed to judgment and execution, he can never have an action on the bail bond although it would appear that the conditions had been broken by the non-appearance of the defendant. The allegation therefore that the defendant in the original action had failed to appear was not sufficient; for admitting it to be true it would have given the plaintiff no cause of action. In this declaration the plaintiff assigns as a breach of the bond that the defendant did not appear, without avowing that he had prosecuted his action to judgment, &c. Suppose this defendant had pleaded that the defendant in the former action did appear, and issue had been taken upon it, it would have been an immaterial issue; for if it had been found against him, the plaintiff would not have been entitled to recover. Finding that the defendant had not appeared, would have furnished no evidence that the plaintiff had performed all the other acts which the law required him to do before his right of action accrued. Suppose the defendant had died after the return of the writ and before judgment; or suppose that for any other cause the plaintiff never had obtained judgment, he could never have maintained an action on the bond although the condition had never been performed. I consider it to be a well settled rule of pleading that a plaintiff cannot recover without setting out in his declaration a clear subsisting cause of action. Thus where there is a condition precedent to be performed on the part of the plaintiff, performance must be averred. And whether the precedent condition be a requisite of the contract or of the law is not material. Thus in an action against an indorser of a note of hand aver-

ments of presentment to the payer, of a refusal to pay and of notice to the indorser are all necessary to enable the plaintiff to recover. But they are all requisites of the law and do not appear on the face of the contract. It is not the less necessary however that they should appear on the face of the declaration. Chitty lays down the rule to be that "when the obligation on the defendant to perform his contract, depends on any event which would not otherwise appear from the declaration to have occurred it is obvious that an averment of such event is essential to a logical statement of defendants breach, 1 Chit. Plea. 308. Is not that precisely the case before us? The objection of the defendant to perform his contract depends on an event which cannot otherwise appear from the declaration to have occurred. It is obvious therefore that such an averment is necessary, or the defendants liability can not appear. The demurrer admits all the facts in the declaration, yet it does not admit that the plaintiff has any cause of action. Because there are other facts which must be established before the plaintiff can recover and which therefore ought to have been avowed in his declaration. Let us test the principle farther by pursuing its analogy to the case already alluded to? Suppose the endorsee of a promissory note to set out the indorsement, to allege the liability of the endorser and the neglect of the drawer to pay. Here would appear prima facie a good cause of action. Yet a demurrer to such a declaration would be sustained. Because the law requires the party to make such a demand of the drawer and to give notice to his indorser before his right of action accrues, and being prerequisites to his right of action must be alleged to have been performed. Suppose the legislature should as the case now before us, superadd as a further requisite that the indorsee should sue the drawer to insolvency before he should have recourse to the endorser;

would it not be necessary that he should make such additional averment to entitle him to his action? I apprehend there can be no doubt on the subject.

I admit the general rule that in an action on a contract it is sufficient to set out the contract, and to assign the breaches in the terms of the contract itself. And it is probable that previous to the act of 1785, this declaration would have been sufficient, because the plaintiff might have brought his action as soon as default of appearance had been made. But when the act of assembly steps in and requires some further act to be done on his part, before his right of action accrues, he must aver the performance of that act before his action can be maintained.

I am of opinion therefore that the demurrer to this declaration ought to be sustained. It still however remains to be determined what ought to be the form of the declaration in such cases. To determine that question, it will be necessary to look again at the act of 1809, which has already been referred to. The object of that act is to give the bail bond to the sheriff the effect and operation of a recognizance of special bail. Taking the two acts together, they furnish the form of declaration which ought to be observed in an action on the bond. Let the plaintiff, according to the provisions of the first act, alledge in his declaration "that he had prosecuted his suit to judgment, and had issued a ca. sa. thereon which the sheriff had returned, that the defendant was not to be found;" to which may be added, according to the English precedents on recognizances of special bail, the further allegation, that the defendant in the original action had not paid the damages, costs and charges so recovered, nor any part thereof, nor rendered his body, &c. Such a declaration would render the proceedings plain and consistent, and relieve the party from all the prolixity which would result from the repetitions, rejoinders, and surrejoinders, &c. to

which a different mode of declaring would lead. I have been more particular in this case than I otherwise should have been, in order that the opinion may embrace the case of Reuben Merrit and others vs. William Halbut, in which a similar question is submitted to us, though in a shape some what different.

The demurrers must be sustained; but as the question is some what new, and one on which a difference of opinion might very well be entertained, the plaintiff may have leave to amend his declaration, so as to meet the views which have been expressed.

Demurrer sustained but leave given to amend.

This case came on again for trial, before Mr. Justice GAILLARD. The bail bond in question had been given to David Becket, late sheriff, and the declaration stated that the bond had been assigned by William Hilliard the present sheriff, and successor of David Becket. The defendant put in a general demurrer, on the ground that the assignment should have been made by Becket and not by Hilliard. The court overruled the demurrer.

Gregg, for the defendant, now moved to reverse the judgment of the court, in favor of the demurrer.

Mr Clintock, contra.

CURIA, *per* COLCOLK, J. The motion in this case is refused. It is considered as a mere question of practice, and although it is clear that in England the bonds are assigned only by the sheriff who takes them, it does not follow that it must necessarily be so here. There the bond is given to the sheriff, and to him only. Here it is given to him and his successors in office. And we certainly have a right to put our own construction on the acts of Parliament which are made of force here. Here the

sheriff is elected for only four years, and when he goes out of office he is required to turn over his papers and books to his successor in office. And although bail bonds are not enumerated in any of the acts which imposes this duty on the sheriff who is going out of office, it is constantly done, and is a convenient practice—for otherwise it might often be difficult to find the sheriff, or get the bond when it is wanted. The cases of sheriffs in England assigning bonds after they are out of office cannot weigh in the determination of the question. It must necessarily be by them, as no other could assign. And with us, in a case in which the bond was not given to the successor in office, I should hold that the former sheriff could assign it.

Not a J. Dissenting. It appears to be admitted that by the English law the assignment must be by the old sheriff. I am not aware of any law authorising his successor to assign in this state. And the mere circumstance of the words, successors in office, cannot in my opinion alter the law. I think therefore that the motion ought to be granted.

Demurrer overruled.

Heirs at law of MASON LEE v. EX. of MASON LEE.

Excentricity however great, is not sufficient to invalidate a Will. The mind is presumed to be sound until the contrary is clearly proved.

- Nor is it sufficient to shew that the imagination of the testator was generally disturbed with a strange belief in witches, devils, and evil spirits, which he fancied continually worried him, and that he lived in the strangest manner, wearing an extraordinary dress, sleeping in a hollow log, and exhibiting other extravagancies, the man being able in other respects to manage his affairs.

To avoid a Will for insanity, a case of general insanity must be made out, of particular insanity at the time of executing it.

It is not every man of a frantic appearance and behaviour who is to be considered a lunatic.

If general insanity is proved, he that sets up the instrument must shew a lucid interval.

That a will is unjust to one's relations, is no legal reason that it should be considered an irrational act.

The law puts no restrictions upon a man's right to dispose of his property in any way his partialities, of pride, or caprice may prompt him.

The number, intelligence, and character of the witnesses on a question of insanity, should have great weight with the jury.

This case came before the court for Marlboro' district, on an appeal from the Court of Ordinary, of that district, admitting to probate the last will and testament of Mason Lee, deceased, who died some short time after executing the will, in July, 1820, leaving the appellants his nephews and nieces, his heirs at law, and two illegitimate sons entirely unprovided for, and giving his whole estate, valued at about \$50,000, to the States of South Carolina and Tennessee. The only question was, whether Lee at the time of making his will, was of sound and disposing mind?

Within the four last years of his life he had made four wills. All these wills were alike, except in the change of the executors and legatees. The first will gave all his property to the United States, the second to South Carolina and Georgia, and the third and fourth to South Caro-

lina and Tennessec. In other respects the four wills were copies of each other. The will in dispute was in the following words :

“ In the name of God, amen, I Mason Lee, of the State of South Carolina, being of perfect mind, memory, and understanding, do make this as and for my last will and testament, revoking and disannulling all former wills and bequests by me heretofore made, ratifying and confirming this and no other to be my last will and testament, in manner and form following, viz. : 1st. It is my will that all my just debts be punctually paid. 2ndly. I will and bequeath unto the two states of South Carolina and Tennessee, all my estate, both real and personal, in equal shares, that is to say, all the slaves which I now have or may hereafter have, I wish hired out in the state of Tennessee for and during the space of *twenty three years* after my decease, under the direction of my after-named executors ; and after the expiration of that term my will and desire is, that the whole of my estate both real and personal, be sold by my executors, and the whole proceeds, with every other part and portion thereof, be paid into the treasuries of the states aforesaid—provided nevertheless, I do not leave my child or children the same or any part thereof, which may be made known by my own hand writing, But in that event, and should they or it die without lawful issue of his, her, or their bodies or body, then to be paid into the treasuries of the states for their benefit and behoof forever. And it is my will and desire that no part or parcel of my estate shall be enjoyed, or in any wise inherited by either or any of my relations, *while wood grows or water runs*, except as above excepted. And my executors are enjoined to contend with them either in law or equity, to enforce this my will, by employing the *best Charleston lawyers*, at the expense of my estate ; or in any other way, *again, again, and*

again. And lastly, I do nominate, appoint, and ordain, Robison Carloss, Esq. of South Carolina, Marlborough District, one of the executors of this my last will and testament, together with one of the first rate Baptist ministers belonging to the association of the state of Tennessee. And it is my desire that my executors shall be liberally rewarded out of my estate, for all expenses and trouble attending the same. And my executors are again enjoined to contend against any of my relations who may wish to have any of my estate, or to defend this will so long as there is money enough left to fee the best lawyer in Charleston, or in the above states mentioned."

On the part of the heirs at law it was proved that, except as it respects Baker Wiggins, Lee had not any good cause for disliking his relations. And the two natural sons, who were twins, had given him no cause of offence. With one of them he was living at the time he made his last will, on the most amicable footing. It appeared that he had come to a settled determination to make a will in favor of no human being; and that this arose from the belief that if he did so, the legatee would wish him dead, or otherwise injure him. He appeared to have no objection to give property to those very relations, whom he disinherited, provided the gift took present effect, and therefore would not be followed by the destructive wish of his death. He accordingly did give property to some of these very relations, to whom he had such an invincible aversion to give by will; and that to Baker Wiggins he had offered to give a plantation for the consideration of seven pence. He was evidently under the further belief that all his relations desired him dead, to get his property; and that for that purpose, to use his own language, they "*squibbed and darted and gummered him*;" that they used supernatural agency, and that in various forms they bewitched him. To prove that this

was a morbid disease, was the disease of the brain, and not an ordinary belief in witchcraft, the following facts were prove. He believed that all women were witches, and would not sleep on a bed made by a woman. He believed that persons at a distance could exercise an influence over his body and mind. He believed that the Wiggins' were in his teeth, and to dislodge them he had fourteen sound teeth extracted, evincing no suffering from the operation. He believed that spells were laid for him, and that he could be bespelled if he made water on the ground; he therefore carried a tin cup in his pocket for the purpose of avoiding making water on the ground. He had the quarters of his shoes cut off, saying that if the devil got into his feet he could drive him out the easier. He had holes cut on each side of his hat, so that if the devil came in on one side he could drive him out on the other. His constant dress was an Osnaburgh shirt, a negro cloth, short coat, breeches, and leggings. He always shaved his head close, as he said that in the contest with the witches they might not get hold of his hair, and to make his wits glib. He had innumerable swords of all sizes and shapes, fifteen or twenty in the course of a year, which he was continually altering. One of his swords was four feet long, with two edges; another eleven inches wide by fourteen long, with a handle. They were made by a neighboring blacksmith, to enable him to fight the devil and witches with success. In the day time, neglecting his business, he dozed in a hollow gum log for a bed, in his miserable hovel; and at night kept awake contending against the devil and witches. He fancied at one time that he had the devil nailed up in a fire place at one end of his house; and had a mark made across his room, over which he never would pass, or suffer it to be swept. He would some times send for all his negroes to throw dirt upon the roof of his house to drive off witches. He once per-

formed a journey of several days, and was within half a day's travel of the place where he was to do important business, when at night hearing the rats running in the loft, he got up, said the witches had followed him, and abandoning his business returned immediately home. All his maladies he attributed to the invisible influence of supernatural agency ; and when laboring under the gravel he believed the Wiggins' had bewitched his penis, as was proved by Doct. Stewart, a witness examined by the executor. He believed that he had conversed with God ; and said he had met him in the woods, and promised him that if he would let him get rich, he would live poor and miserable all his life ; and he seemed to have kept his promise. While he lived in Pedee swamp, he dwelt in a house worse than any of his negro houses. The approach to it was over the high fences of a stable yard. His hogsty was directly before his door, out of which he had to step into the low door, which was not high enough to admit him erect. His bed was a split hollow gum log, with one or two blankets. In this gum he would some times keep three or four razors, and as many pistols. He had no chair or table in his house, nor platter, dishes, or plates. He used a forked stick. His meat was boar and bull beef, and dumplings, served up in the same pot in which it was boiled, placed on a chest, which answered him for both table and chair. From this pot he eat with a spoon, a knife, and a fork, or his forked stick ; all of which had been sent to the blacksmith and cut in two, a piece taken out, and then rivetted together again, to prevent spells. He drank his whiskey from a jug, having no tumbler. He would not drink out of a tumbler after another person to avoid harm. His clothes were of his own make. They had no buttons. The pantaloons were wide as petticoats, without any waistband, and fastened round him by a rope. His coat was rather a cloak, and

his great coat a blanket, with a hole cut through it to receive his head. He was remarkably filthy, not cleaning his clothes for months. His saddle was a piece of a hollow gum log, covered with leather of his own make. A few years before his death he went to live with a Mr. Dubose, in Darlington, who would not receive him into his family, but built a house for him about twelve feet square. He complained that it was too large, and Dubose gave him aid to pull it down and reconstruct it to his own taste. He did so. It was three feet wide, five feet long, and four feet high. In this kennel he eat, slept, and dozed away his time.

In his younger days he had been brought up in North Carolina among decent society, where he lived until he was about thirty years old. Here he discovered no very striking peculiarities of dress or manners or modes of thought. He dressed and behaved as others of his standing in society. According to his account, about this time he was struck by lightning. He soon after removed to Georgia. Here he began to discover the peculiarities which ever after marked him; and here he killed a negro, for which he fled from that state. He always discovered great fear of lightning. While in this state he was easily alarmed without apparent cause. Once he became greatly agitated by a wooden clock, fancied that it racked his body and mind, made a contract to purchase it for the purpose of destroying it, to get rid of the torment it produced, and afterwards rescinded the contract least it might bring on a greater calamity. From the time he came to this state, which was some years before his death, the management of his property was most extraordinary. His overseers were examined. He had his ploughs and plantation tools made in such shape that they would not use them. He scarcely ever went to the plantation, but dozed away his days, and was awake

almost all night beating and striking about the room. As evidence of his peculiarity in the management of his affairs it was proved, that he suffered no bull or boar on his plantation to be castrated. But he cut off all the tails of his hogs and cattle close to the roots. He said the cows made themselves poor by fighting the flies with their tails, but cut them off and the cow would get fat as squabs. This was not a mere transient whim, he acted on it uniformly, so he always cut the ears of all his horses and mules close to the head. When he once purchased a horse from home, he instantly cut off his ears and mounted him while bleeding. He hoed his corn after frost, and said it would come out green again. His bargains and plans for making money were all peculiar, and generally losing. He gave long credits without interest. He sold one place for \$7,000 to be paid in seventeen years without interest, and if the purchaser did not like his bargain at the end of that time he was at liberty to give it up without paying rent. He assigned as a reason for this bargain, that the land would not be worn out, and at the end of that time it would be worth ten times as much. He purchased towards the close of his life a large extent of poor, flat, pine land, without seeing it, and put his negroes there without a house or hut on it. They cleared and girdled the trees of two thousand acres, for the purpose he said, of planting it in pindars, (ground nuts,) by which he was to make a fortune. He suddenly abandoned it without ever planting an acre of it. He never was known to go to church. He took no interest in public affairs, never voted, or was required to do militia, patrol, or road duty. His peculiar opinions, extravagancies, and follies were held and exhibited both when sober and when drunk. He assigned various reasons for making his will, and not providing for his illegitimate sons or relations. His reason for not providing for one

son was, that although he was a twin brother of the other, he was the father of only one of them. He stated as a reason for leaving him nothing, that if he did the Wiggins' would law him out of it, as they were determined to break his will, and he must therefore leave it to South Carolina and Tennessee, who could defend the suit. The reason he gave for directing in his will that his negroes should be hired out in Tennessee for twenty three years was, that by that time the present generation of Taylors' and Wiggins' (his relations,) would pass away, and these states would be able to raise money enough to contend with them for the property. When one of his wills was about to be executed, a witness was sent for, many miles, although there were many respectable persons present. The witness arrived about nine o'clock in the morning, when the will was prepared and ready for signature, but Lee would not sign it till all present declared that it was past twelve o'clock. He assigned as a reason for making Tennessee a legatee, that he had relations gone there.—It did not appear he knew any person in that state, and therefore designated one of the first rate Baptist preachers of that state as his executor, without naming him.

He wanted a coffin to be made of two inch oak plank, and like a seaman's chest. He once proposed to build a house to be four feet wide, with a chimney at the side.—He had a sulkey made. His directions were, to have the shafts exactly nine feet long, and the chair and seat to be square, the sticks of which were to be worked with a drawing knife, and not turned, and the cross bars to be made square. His wearing apparel at his death was appraised at one dollar.

In favor of the will a great number of respectable witnesses were examined as to the sanity of the testator.—They thought him sane and perfectly capable of managing his business, but that he was eccentric. Some

thought that his singularity was owing to avarice, and that his dress was owing to a species of affectation or pride, and that it diminished in the latter part of his life. He kept sober some two or three weeks before he made his will, for the purpose of executing it. Some thought him a fool when drunk, but quite intelligent when sober. The three witnesses who subscribed the execution of the will were respectable men, living near him, and knew him well; they swore positively to his capacity at the time of its execution, and to the fact of his keeping sober for that purpose. In his last illness he was asked by a witness if he did not believe in witchcraft, and he jocosely proposed a mode of getting rid of the spell. Lee replied to him, "that he was not so credulous as to believe any such thing—that he knew his disease was the gravel, which would be the cause of his death." Some thought him very keen in a bargain when sober. He made many contracts, some of considerable importance, and good ones, though often eccentric. Some of his contracts which at first appeared very foolish and eccentric, when explained turned out to be the best that could have been made.— He declared over and over that his relations, the Wiggins' should never have any of his property. He always believed that one of them had been at the head of a plot to seize him, and to take him to Georgia, to stand his trial for killing his negro. One witness swore to the truth of the fact, and that Wiggins' object was to get some of his property. This witness' character was attacked. But Lee had been informed of the plan, and by his decided conduct had prevented it. He always believed that Wiggins was at the head of it, and was so informed. This led him to mistrust all his relations. He said that he would leave his natural son property, but that he could not stand his hand against the Wiggins', who he dreaded might set aside the will, and get his property. He therefore pre-

ferred giving it to the states, whom he thought would be better able to compete with the Wiggins'. His attorney, a gentleman of intelligence, who transacted a good deal of business for him at different times, thought him perfectly sane when sober. When a young man he had been a good accountant, and several papers of his drawing were exhibited in evidence. They were very well executed. His natural son, whom he acknowledged, thought him sane, when sober. Some of the witnesses thought his ploughs were well constructed. Wiggins, the appellant, on one occasion had left the state, and Lee was appointed his attorney in his absence. He had also sold him a number of negroes.

WATIES, J. before whom the cause was tried, charged the jury, that the peculiar nature of the case made it one of great difficulty and some doubt. The issue between the parties, (said his honor,) was, whether the testator Mason Lee, was of sound mind or not, at the time he executed his will. The evidence consisted partly of examinations taken under commissions, and partly of oral testimony. The first is of witnesses in North Carolina, who described the early habits and conduct of the testator to have been generally as regular and correct as those of other young men, although manifesting occasionally some singularity; also of witnesses in Georgia, (to which state he afterwards removed,) who testified that his mind and conduct had then undergone a great change, and betrayed strong marks of derangement. The witnesses who have been examined in court give a detailed account of his life from the time he came into this state until his death. The counsel for the appellant rest their allegation of his insanity on the following grounds: 1. His belief in witchcraft, and a supernatural agency. 2. His eccentric habits; and 3. His aversion to his relations. His honor was of opinion that a belief in witchcraft, although sometimes the

symptom of a disordered mind, was not of itself any proof of it, as it had often been entertained by persons who were above all suspicion of insanity, and even by men who were distinguished for their wisdom. He thought also that the eccentricities of the testator might be traced to other causes than insanity. They exhibited indeed singular instances of personal privation, and of a distempered imagination. He was filthy in his dress, slept in a hollow gum, eat out of a pot with a broken spoon, and had no furniture in his house. He imagined himself engaged in a constant warfare with evil spirits, complained of their incessant assaults, and provided the strangest weapons for his defence. Such conduct if it stood alone, might very well be called insanity, but it appeared that he was most distracted with those phantoms when he was drinking a great quantity of ardent spirits, and that he was disposed at all times to be intemperate. It was proved too by a great number of respectable witnesses, that when sober he conversed sensibly on most subjects, that they regarded him as a very singular man, but not insane, that he made frequent contracts, many of which were to a considerable extent, and although some of them were whimsical, yet the result was generally advantageous to him; and these witnesses were all of opinion that he was perfectly competent to manage and dispose of his property. It was an important fact, that the appellant Wiggins had himself sold to him a number of negroes, and on leaving the state on some occasion had so much confidence in his discretion and judgment, that he had appointed him his attorney to manage his affairs in his absence.

The third ground relied on to show insanity was the aversion of the testator to his relations. This fact was fully proved, and if his relations had lived in friendly intercourse with him, and he had excluded them all from his will without any cause, it might have been considered a

strong indication of a perverted mind ; but he assigned reasons for this exclusion, some of which appeared to be well founded, and to justify his belief that they had treated him ill, and particularly that Wiggins had conspired with others to have him seized and carried to Georgia, to answer to a criminal charge in that state. He did not therefore regard his aversion to his relations under these circumstances as any evidence of insanity.

But the main question in the case was whether the testator was insane at the time of making his will. This was the issue to be tried, and he stated to the jury that the will could only be invalidated by proof of an existing insanity at the time of making it, or by its being so irrational an act as to afford intrinsic evidence of this. If a man had been found a lunatic, or might be considered so in the legal sense of the word, (that is *non compos mentis*,) all his civil acts were void, whether they could be traced to the malady or not, because his insanity has become a habitual state. But it was not (as was said by Lord Erskine in his celebrated speech for Hadfield,) every man of a frantic appearance and behaviour who is to be considered a lunatic, either as it regards obligations or crimes, but he must appear to the jury *non compos mentis*, not at the *anterior period*, but *at the moment* when the act was done. Coop. Med. Jurisp. 396. In the case of Cartwright vs. Cartwright, 1 Phil. 100, this doctrine was carried still further. "If (it was there stated by the court,) you can establish that a party *habitually* afflicted by the malady of the mind has intermissions, and if there was an intermission at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it." Having presented to the jury these views of the law, he proceeded to consider the evidence which related more immediately to the making

and execution of the will, and which he thought of most importance.

It appeared to him to bring the testator's case fully within the law before stated. The will was drawn by his direction, was transcribed from one which he had formally dictated, and was consistent with the previous and repeated declarations of his intention. He abstained from drinking any ardent spirits for two weeks before he executed it, that he might keep his mind collected for the purpose. The person who drew the will and the witnesses to the execution of it, all deposed to the perfect soundness of his mind at the time; and during his last illness which soon after ensued, on its being suggested to him in jest that he might be troubled by witches, he replied "that he was not so credulous as to believe any such thing, that he knew his disease was the gravel, and that it would be the death of him." There was so much deliberation and thought in all this, that even if the testator had been before afflicted with habitual insanity, yet this conduct was sufficient to establish a complete intermission. But it was contended, that the will itself spoke the language of insanity. It could not be denied that it was a strange will, and if not the production of an insane mind, it was no doubt that of a very eccentric one. It might be regarded too as unjust to his illegitimate sons, if not to his other relations. But it was not therefore an irrational act in a legal sense, nor it was so eccentric or unjust as many other wills which had been made by men of unquestionable sanity. It was not as much so in either respect as the will of Thelusson, who had deprived his children and grand children of nearly all enjoyment of his immense estate, that it might accumulate for the benefit of a contingent and remote descendant who might never come into existence, and if he should not, for the benefit of the sinking fund of Great Britain. But his

will was allowed to stand, because the law puts no restriction on a man's right to dispose of his property in any way in which his partialities, or pride, or even caprice may prompt him, if he does not infringe any rule of policy. In the present case the testator appeared to have the double design of shewing his resentment to his relations, and of indulging in the ambitious vanity of having himself recognised by the states of South Carolina and Tennessee as their benefactor. He concluded his observations by stating to the jury, that in exercising their own judgment on this difficult and mysterious subject, if the testator was not proved to be insane by full and unequivocal evidence, they were bound to find in favor of his sanity. A rational state of mind is the natural state of every man, and until there is full proof of insanity the law presumes that every man is in a rational state when he does any act either civil or criminal. He further stated that in weighing the testimony the jury ought to take into consideration the number and character of the witnesses; and it appeared that of those who thought the testator insane the most material of them were his overseers, who only witnessed his conduct at home, when he was under the excitement of continual intoxication; on the other hand, that the witnesses who testified to his sanity were more in number, longer and more intimately acquainted with him, and from their education and condition in life must have had more discernment and were better qualified to judge of the true state and character of his mind.

The jury found a verdict in favor of the will, and the heirs at law appealed.

Ervin, Blanding and Harper, for the appellants, and *Evans and Preston* for the will.

The council against the will relied principally on the ground of partial insanity, exhibited in his hatred to his relations, and that laboring under that delusion he had

disinherited them. That the grand defect of his mind was in relation to those objects that stood nearest to him by the laws of nature; and under this disease of the mind he made this singular disposition of his property, and that this delusion must avoid the will. They principally relied on the authority of Lord Erskine's argument in Hadfield's case.

The counsel for the will contended that they had made out a case of sanity, but of great eccentricity, and that even admitting that Lee was generally unsound, yet they had clearly proved a lucid interval at the time of executing the will and for two or three weeks previously thereto. They relied principally upon Cartwright vs. Cartwright, 1 Phillimore's Rep. 90. White vs. Driver, Ib. 84. Kinleside vs. Harrison 2 Phill. 454. Greenwood's case, cited in White vs. Wilson, 13 Ves. 49. and Faulder vs. Silk, 1 Coll. on Idiots 390.

CURIA, *per* NOTT, J. There does not appear to be any such error in the charge of the presiding judge in this case, as calls for the interposition of this court. It was a mixed case of law and fact and both were fairly and correctly submitted to the consideration of the jury. And the evidence seems very well to have authorized the verdict which they have found. The motion is therefore refused.

New Trial Refused.

INGRAM VS. PORTER.

A father by deed of gift gave to his daughter a slave "to hold &c. after his death." Held that the right of property vested immediately in the daughter, and her right barred by the statute of limitations, during the life of the father.

A future interest in a chattel, opposed to the present interest in the grantor, cannot be created.

Where the habendum of a deed is wholly inconsistent with the premises, so that they cannot stand together, the habendum must be considered as void.

The doctrine of covenants to stand seized stated.

A paper sometimes in form of a deed, may be considered a will.

Delivery of a deed to a proper officer to record, is such a delivery as consummates the deed.

This was an action of debtinue for a negro slave. The plaintiff claimed under a bill of sale from Jos. Ingram, who purchased the negro in Dec. 1809, in North Carolina, from Daniel Porter, and sold to the plaintiff 10th April, 1810, who had possession until March 1820. Daniel Porter died in 1820. This suit was commenced soon after. The defendants claimed under a deed of gift from Daniel Porter to his daughter, the wife of defendant. This deed was executed the 20th Feb. 1802, and recorded in the Register's Office of North Carolina. The witnesses to this deed were dead, the original had been destroyed and an office copy was given in evidence; but no proof of the delivery of the deed was made out. Daniel Porters' daughter at the time was quite a child living with her father. This deed was in the following words:

"To all to whom these presents may come, I, Daniel Porter, of the state of North Carolina, and county of Anson, send greeting. Know ye, that I the said Daniel Porter, for and in consideration of the natural love and affection, which I have and bear unto my beloved daughter Phoebe Porter, of the state and county aforesaid, and divers other good causes and considerations me thereunto moving, have given and granted, and by these presents

do give and grant unto the said Phoebe Porter, 'all and singular, one negro girl named Rose, to have hold and enjoy all and singular the said negro girl, Rose, after my death to the said Phoebe Porter, her heirs, executors, and assigns, to the only proper use and behoof of her the said Phoebe Porter, her heirs and assigns forever, and I the said Daniel Porter all and singular the said negro girl Rose to the said Phoebe Porter her heirs, executors, and assigns, against all persons whatever shall and will warrant and forever defend by these presents. In witness whereof I the said Daniel Porter, have hereunto set my hand and seal this 26th February, 1802."

The defendant contended that the deed gave only a life estate to Porter, remainder in fee to his daughter, and that the deed was valid.

The plaintiff replied that the deed was fraudulent, that it was also void from the nature of it, and that if it were valid that the plaintiff had a legal right under the statute of limitations.

The case was tried before HUGER, J. who charged the jury in favor of the deed, and for the defendant on all the grounds. The jury found a verdict for the defendant, and the plaintiff appealed.

Brickell and *M'Cord*, for the appeal. This paper may be regarded as a testamentary paper; if so, it was revocable, and actually revoked by the subsequent sale. 1 Philimore 242. There was no proof of the delivery of the deed. Nothing to consummate the contract. 2 Black. Com. 306, 441. As to the statute of limitations they cited 1 Brev. 170. 2 Sch. and Lif. 628. The limitation in the deed was also void under the authority of the cases of *Vernon vs. Inabnet*, 3 Brev. MS. R. 380, and *Cooper vs. Cooper* Ib. 320.

The deed was also fraudulent and void against a purchaser without notice from the donor.

Bauskett and *Gregg*, in reply. The deed was recorded. That was sufficient evidence to raise the presumption of a delivery. They contended that the deed was valid, and that the verdict should be supported.

CURIA, *per* COLCOCK, J. This case has been detained by the court for a long time, in the hope that a decision which is said to have been made by the constitutional court, on a case bearing a strong analogy to this, would have been procured. But as it cannot be had, we must decide the case.

In the former opinion the court did not determine how the daughter would take under the deed, but only generally that they were of opinion she had an interest under the deed, and from all the circumstances of the case we entertain the same opinion. Where the habendum of a deed is so wholly inconsistent with and repugnant to the premises, so that they cannot stand together, the habendum must be considered as void, and if the premises pass any thing the grantee shall hold. Now in the first part of this deed the property is given absolutely and in presenti.—The habendum after the death of the father is utterly inconsistent with the present interest, and therefore cannot take effect. Delivery is indispensable to the completion of a deed, and in this case the delivery to the officer to be recorded for the benefit of the daughter, may be considered as a sufficient delivery. And thus an absolute right in the negro may be considered as passed to the daughter. But under the circumstances such an interest would not benefit the defendant, and therefore it was contended that this deed may be considered as conveying a future interests to the daughter, the property to be held in the mean time by the father. It was urged that the obvious intention of the party ought to be effectuated if possible, and that it had been held in cases like the one before us, that such a deed of real property though not good as a bargain

and sale for the want of a consideration, nor as a release for the want of a lease for a year, nor as a feoffment for the want of livery, yet should be held good as a covenant to stand seized, and that by analogy this might be considered as giving the right to the daughter and making the father trustee for life, or to the daughter as trustee for the father for his life. But this cannot be done, for the rules of law in relation to the alienation of real property, are essentially different from those which relate to personal. When it is said the deed must operate if it can, it is meant if it can consistently with the meaning of the parties, as regulated by the rules of law. It is not intended that the plain and obvious meaning of words are to be entirely changed, and that those wills which are peculiarly applicable to one subject are to be applied to another, for this would in effect be making a deed and not construing one. Now such a deed conveying land has been held to operate as a covenant to stand seized, by the operation of rules exclusively applicable to real estate. The grantor conveys an interest reserving a use, and by the statute of uses that use is converted into possession, and he is in holding for the grantee. 4 Mass. 135. But this statute relates entirely to lands, and could not in the nature of things be applied to personal property, for the possession of that is always prima facie evidence of ownership; whereas in those days in which these rules of law, as applicable to real property, had their origin, the possession of it was for the most part in those who did not own it, and those who possessed as well as those who owned it, were subject to a great many services and duties which it was the object of the statute to secure. But even in relation to land, where one has a personal right in it, such a deed would pass a present and absolute right to the grantee. That is, all the right of the grantor. Coke says, if Termor grant the unexpired term, habendum after his death, it passeth; for

one cannot be tenant to a dead man. The idea is clearly expressed that a future interest in a chattel, opposed to the present in the grantor, cannot be created. If given it passes at once. If not given, of course it cannot pass, but must depend on the future will of the grantor. Such a deed as this found among a man's papers, who died in the possession of the property given, might perhaps under circumstances be considered a will.

If it were possible to consider this as a covenant between the parties, the father by a sale has broken his covenant, and that might give the daughter a right of action, but could not give her a right to the property in opposition to that of the purchaser.

The case must be considered as at an end, for the property being absolutely vested in the daughter by the deed, she is barred by the statute of limitations, and this renders it unnecessary to say any thing on the other grounds taken in the brief; and the same result would follow if the daughter took nothing by the deed. The plaintiff must recover. From my best recollection of the case of M'Michael and Inabnet, alluded to in the first part of this opinion, it was in some respects like the case before us, except as to the delivery.

New Trial granted. (a)

(a) See Harper's L. R. 492.

LAW CASES
ARGUED AND DETERMINED IN
THE COURT OF APPEALS,
OF
SOUTH CAROLINA,
IN
APRIL TERM, CHARLESTON, 1827.

JUDGES PRESENT.

HON. ABRAHAM NOTT, *Presiding Judge.*
HON. C. J. COLCOCK,
HON. DAVID JOHNSON.

STONE vs. WILSON.

A bond is good, though the obligor's name be not inserted in the body of the bond, he having signed, sealed and delivered it. The body of the bond mentions but one obligor, A. but it is signed, sealed and delivered by A. and B. Held that the bond was valid against B.

This was an action of debt on bond, against the defendant Wilson. The bond, in the body of it, purported to have been given by one Jerideau alone, but at the bottom it was signed and sealed by Jerideau and Wilson.

GANNT, J. who tried the cause, admitted parol evidence, to shew the consideration of the bond, whereby it appeared that Wilson was interested and properly a party obligor to the bond. The jury found a verdict for the plaintiff, and this was a motion for a new trial.

CURIA, *per* NOTT, J. This is a case somewhat of a new impression, but it is not difficult to perceive what was the intention of the parties; and the question is, whether there is any technical objection to carry that intention into execution. Writing upon parchment or paper, signing, sealing and delivery, are the only requisites of a deed. No particular form is required to give it effect. The form of a promissory note, in which the name of the maker is not mentioned, if accompanied with the solemnity of a seal, and the signature of the party, is as obligatory as a penal bond; and if in the form of a penal bond, it would not be less so by omitting the names of the obligors in the body of the instrument. An instrument of writing in the singular number, if signed and sealed by two is equally obligatory on both, and the question now is, whether mentioning the name of one precludes the inference that the other was intended to be bound. Suppose that at any given period after a bond had been executed and delivered by one person; it became necessary to add another obligor, would not signing, sealing, and delivery by such other person make it his deed? Would it be less obligatory on him because the name of the first obligor only was inserted in the body of the bond? It would appear to me to require some considerable refinement to come to such a conclusion. In the case of Crosby vs. Middleton, 2 Rep. in Chancery 99, where the name of one obligor was omitted to be inserted in the bond by mistake, the Lord Keeper said the hand and seal were sufficient evidence, and the omission of the name a sufficient accident for equity to relieve against.

If that case is of any authority, it proves that the plaintiff may maintain a suit in equity on such a bond ; and if, as the Lord Keeper said, the signing and sealing be sufficient evidence, I can see no good reason why it should not be as good at law as in equity. In 3 Wharton's Dig. 79, it is said to have been decided in the state of Tennessee, that " though the name of a party is not mentioned in a bond, yet if he signed and sealed it, he will be bound," Williams vs. Green, 4 Heywood 294. In the case of Bartley and Ferguson vs. Yates, 2 Hen. and Mun. 398, it was held that a party was bound whose name was not inserted in the penal or obligatory part of the bond. In that case some reliance was placed on the circumstance that the name of the party was mentioned in the condition. But that was relied on only as evidence of the intention, and could be of but little importance where the intention was otherwise sufficiently apparent ; and of that I should consider the execution and delivery sufficient evidence. In the case of Joseph Smith vs. Daniel Crocker and others, 5 Mass. Rep. 538, the name of the surety had been omitted, and inserted after the bond was executed and delivered. The question was, whether that was such an alteration as rendered the bond void. C. J. Parsons, who delivered the opinion of the court, said it was clear that the surety would be held as an obligor on his executing the bond, if the blank had never been filled with his name. The filling up of the blank was, therefore, not a material alteration. All these cases shew that inserting the name of the obligor in the instrument, adds no binding efficacy to the obligation. It is only evidence of the intention of the party. It is contended that the intention must be collected from the instrument itself, and cannot be proved by parol, and that the parol evidence which was given in this case, of the consideration for which the bond was given, ought to have been rejected. But the execution

and delivery of a deed is always proved by parol. It is the very object of the attestation by witnesses; and proving the consideration added nothing to the force of the obligation itself. No witness was called but the subscribing witness to the bond, and it does not appear to me that the objection could have prevailed, if other witnesses had been called to the same facts. There are many instances of antient deeds having been executed in the presence of witnesses who are named *cum multis aliis* who, I presume, might have been called to prove the execution, if necessary. And the execution and delivery being proved, the deed itself furnishes evidence of the purpose for which it was executed. This case differs from those where we have held that signing and sealing a blank paper created no obligation. In those cases some essential requisite of a deed was wanting, which could not be supplied afterwards. But in this case there is nothing to be supplied. I am of opinion that we are authorized as well by the cases relied on as by the general principles of law, to support the decision of the Circuit Judge.

New Trial Refused.

GREIR, Relator vs. JOHN TAYLOR, Governor, &c.

Prohibition will not lie against the Governor to restrain him from granting a commission to an officer who has been improperly elected.

At a late election for sheriff of Georgetown district, on the second Monday in January, 1827, the relator and Robert Thurston were competitors; and Thurston was declared elected by the managers. The relator objected to the regularity of the election, and this was a motion for a prohibition before Judge Bay, at Chambers, to re-

strain his excellency, from granting a commission to Thurston, on the ground that the election was void.

BAY, J. As this is an entire new case, out of the routine of the ordinary cases in which prohibitions have been usually granted, there are no authorities in the books to aid me, or throw any light on the subject; I am, therefore, obliged to resort to principles to bear me out in the opinion which I must give on this application. In England the king is said to be the fountain of all power and authority in that kingdom. All the courts and judges in his dominions derive their jurisdiction and exercise their respective functions from him and under his name. Hence, it has resulted from his supremacy that the judges of his superior courts of law, although they have the power to keep all the inferior tribunals and officers in the kingdom within their proper limits, and to prevent them from exercising jurisdiction in cases not belonging to them, yet they have no power to restrain the king from the exercise of any of the prerogatives or authorities appertaining to, or belonging to the crown. A prohibition is a high prerogative writ proceeding from the king himself and emanating from him; it would, therefore, be a solecism to send such a writ to restrain him, who is omnipotent in such cases and whose authority is underived from any other power on earth. Such a proceeding, therefore, would be something like sending out a process to restrain himself, which would be absurd and nugatory in its very nature. In our country the people are supreme. All civil power and authority is derived from them, and by virtue of their inherent prerogatives, they have thought proper, in order to establish justice and to prevent all irregularity and confusion, to make known and publish to the world their great republican charter, called a constitution, by which all the powers of the state are regulated and governed. By this constitution, all the powers of the

government are distinctly defined and vested in their separate branches, namely, the legislative, the judicial and the executive, all of which are independant of, and have no control over each other. The legislative branch has the power of making and enacting all laws for the government of the citizens. The judicial has the power of construing those laws so made, and of declaring their bearings on the citizens; and the executive is charged with the authority and power of causing all those laws to be duly executed, and of granting commissions to all the officers of government for the exercise of their respective functions in office for the benefit of the whole. But no one of these different departments has any right to interfere with the others in the legal execution of their official duties. It is admitted that the judges of the superior courts of law in the exercise of their judicial powers, have a right by the common law of the land which is recognised by the constitution to send out this high prerogative writ to restrain all the inferior courts and jurisdictions, or bodies of men appointed for special purposes from doing illegal or unauthorized acts. But they have no power or authority to send out such a writ to either of the other great branches of the government; for, if they had such a power to invade the province of the executive and to say, he shall not exercise his official right of issuing commissions, &c. &c., it is difficult to see any good reason why they should not send the same writ to the other great branch of the government to restrain it from passing any law which they might conceive was an impolitic or unconstitutional act. Thus such a doctrine would be laying the foundation for a scene of confusion and clashing of jurisdictions, as would in a very limited period, destroy our present happy and well poised government, the idea of which cannot for a moment be tolerated. For these reasons, I am clearly of opinion that the

writ of prohibition will not lie in any case against his excellency the Governor of the state, to restrain him in any of the powers given him by the constitution. Let the suggestion, therefore be dismissed.

The relator appealed.

Wilson, for the relator. It will be admitted that so far as sovereignty is attached to the office of Governor, he is superior to the authority of the court. But in issuing a commission to a sheriff he acts in a mere ministerial character, and like all other ministerial officers is under the controul and direction of the courts of justice. By the laws of this state managers are appointed to conduct these elections, and to them is confided the decision of all controversies arising out of it, and it is upon their certificate he is required to issue a commission. He (the Governor,) exercises neither judgment or discretion in relation to it, and is the mere instrument to carry the law into effect. He then went into the regularity of the election.

Porter, contra. It would be a dangerous precedent if one of the co-ordinate branches of the government were to interfere with the powers vested in the other, but it is not desired that this case should be concluded by this question. It is matter of public importance that a construction should be put on these acts, that there may be a uniform practice established throughout the state.

Petigru, same side. The writ of prohibition only lies by a superior judicial tribunal to an inferior tribunal. The Governor possesses no judicial power. His office and powers are co-ordinate and is supreme; and it would make confusion worse than confounded if one branch of the government was to attempt to control the other.

CURIA, per NOTT, J. It is unnecessary to add any thing in this case to the opinion which has been expressed by the judge to whom the application was originally made. I will nevertheless observe, that a constitution

has been defined to be "a form of government delineated by the mighty hand of the people." It establishes the different branches of the government, and assigns to them their respective duties and powers. By the constitution of South Carolina they are rendered co-ordinate and independent. Neither can control the other in the exercise of its legitimate functions. To the judges belongs the power of expounding the laws; and although in the discharge of that duty they may render a law inoperative by declaring it unconstitutional, it does not arise from any supremacy which the judiciary possesses over the legislature, but from the supremacy of the constitution over both. Whenever therefore, an act of the legislature comes in contact with the constitution, the latter must prevail. But the judges have no power to restrain the legislature from passing an unconstitutional law, nor to restrain the governor from carrying such a law into execution. For such abuse of power they are answerable only to the sovereign people. ✓ I concur therefore in the opinion which has been given, that the prohibition ought not to have been granted. His honor here went into the question of the regularity of the election, but as the act of 1827 has made new provisions for the election of sheriffs in all cases, the Reporter has omitted that part of the opinion.

Prohibition refused.

TURNBULL VS. STROHECKER.

All objections and pleadings in reply to a discount are ore tenus, and require no previous notice; and a discount barred by the statute of limitations is inadmissible if objected to. Buller N. P. 180. Mont. on Set Off, 20. Peake's N. P. Cases, 121. Tidd's Prac. 604. 17 John. Rep. 330.

Where plaintiff sues on an account made up of various items, some of them within four years, and the others of longer date, the items charged within four years will not prevent the statute of limitations from running against the other items, where they are only demands by A. against B. in the common way of business, charged from year to year, and not mutual accounts running between two persons. The rule never applies where all the items are on one side. *Cotes vs. Harris*, Buller's N. P. 150. *Catling vs. Skoulding*, 6 T. R. 191.

Where an administrator sets up a discount, which is of four years standing, it is no objection to the statute of limitations, that the administrator is allowed nine months to collect the debt, as during the nine months he may sue, though he cannot be sued.

ATCHISON vs. GEE.

The statute of 9 Ann c. 14, against gaming, is made of force in this state by the act of 1712, making of force all statutes passed between the eighth year of that Queen, and the passing of the act in 1712.

Though horse racing is not mentioned in that statute, yet it is included under the words "other game."

A bet over £10 lost on a horse race, and paid by the loser, may be recovered back within three months, under the provisions of that statute.

Cases cited. *Goodburn vs. Marley*, Str. 1159; *Blaxton vs. Pye*, 2 Wilson 309; *Clayton vs. Jennings*, 2 Bl. R. 706; *Lynall vs. Longbottom*, 2 Wilson 36; *Brown vs. Berkley*, Cowp. 281; 1 Wilson 220; *Woatan vs. Hasket*, 1 Nott and M'Cord 180.

WILLIAMSON VS. BROUGHTON.

Judgments at common law do not carry interest.

By the act of 1815 interest is allowed on judgments recovered on causes of action which bore interest themselves, and the interest may be collected on the execution.

Judgments only give a lien to the amount recovered, and if an action of debt is subsequently brought on the original judgment, not bearing interest, and interest is recovered by way of damages, and before the second judgment, other judgments are obtained, the first judgment only gives a lien for the amount then recovered, and the interest recovered by way of damages on the second judgment, cannot have a prior lien to the intermediate judgments of third persons.

Where judgments have been recovered after that act, and then actions of debt are brought on the judgments recovered previous to the act of 1815, and interest recovered by way of damages, in distributing the funds of the debtor, only the amount of the judgments as recovered before 1815, are to be paid before the judgments recovered after that act, and the damages recovered in the actions of debt on the first judgments, come in after the judgments are satisfied which were recovered after the act and prior to the judgments in the cases of debt on the previous judgments.

It may seem surprising that this term of the court at Charleston should afford so few cases. But the arrangement of the sittings of the court had just been altered by the legislature, and the court sat but a few days in Charleston and then adjourned to Columbia. The Reporter has also found great difficulty in determining to which term many of the cases belong, as the MSS. from Charleston often afford no means of ascertaining the fact.

LAW CASES
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IN
JUNE TERM, COLUMBIA, 1827.

JUDGES PRESENT.

HON. ABRAHAM NOTT, *Presiding Judge.*

HON. C. J. COLCOCK,

HON. DAVID JOHNSON.

The Administrator of LEE vs. the Executors of POLK.

Where a defendant admits an account, but says that there is a discount to a greater amount, it is not such an acknowledgment as takes a case out of the statute of limitations.

This action was brought on an open account. It appeared that the defendant's testator had been indebted to plaintiff's testator the amount of the account. A witness was produced who had presented the account to the defendant in September 1824, who admitted the account, but said there was a discount to a greater amount.

The defendant relied on the statute of limitations, and the question was, whether these words amounted to an acknowledgment.

HUGER, J. who heard the cause, thought they did, and a verdict was found for the Plaintiff.

Mayrant and Richardson, for the defendant appealed.

Miller, contra.

CURIA, *per* JOHNSON, J. The rule on this subject is well settled. A promise to pay, or a bare acknowledgment of a subsisting debt, will revive a demand barred by the statute of limitations, and very slight circumstances are laid hold of to give effect to such promise or acknowledgment. The cases have gone already very far towards a repeal of the statute, and I am not disposed to carry the doctrine any farther. But there is no case which has yet gone the whole length to construe a direct and positive negative into a promise to pay, or as the acknowledgment of a subsisting debt; and such I think, is the effect of the facts proved in this case. The language of the defendant, and which is relied on to take this case out of the statute is, "the account may be correct, but your intestate is indebted to my testator in a much greater amount, and I will not therefore pay it." Now this declaration must be taken together. It contains not only an express refusal to pay, but also an averment that nothing was due. The language of it is, I owe you nothing, because you owe me a sum to which this account ought to have been credited.

The case of *Lee administrator of Lee vs. Perry*, 3 M'Cord 552, is perhaps the strongest case opposed to this view. There the defendant admitted the note had not been paid, but declared that he would not pay it unless compelled by law, as it was out of date, and he had received no consideration. But in that case there was an explicit acknowledgment of the debt, and the allega-

tion that he had received no consideration, is repelled by the consideration expressed in the note, and in this respect the two cases differ.

New trial granted.

Executors of CROSLAND vs. MURDOCK.

The executor derives his authority over the goods of the testator from the grant of the ordinary, but not so with regard to lands devised, or a power to sell lands; these the devisee takes directly under the will, from the testator.

The decree of the Ordinary against a will is not conclusive against the rights of a devisee of lands, or of one who takes a power to sell lands, or their privies; nor is the finding of the jury on appeal from the ordinary.

The power of the court of common pleas in cases of appeals from the ordinary on questions in relation to the validity of wills, is entirely appellate, though the matter is examined over de novo, and the verdict of the jury is not more conclusive against a devisee, than the decree of the ordinary. It is but the judgment of the ordinary corrected or affirmed by an appellate tribunal.

An estoppel must be reciprocal and equally binding on both parties.

Devise to an executor to sell lands. He sells to A. In the mean time the ordinary gives judgment against the will, and the jury confirms his judgment. To a suit against the purchaser for the purchase money, the judgment of the ordinary thus affirmed, is no estoppel against the suit by the executor.

This was an action of debt on bond. Edward Crosland, the testator, by his last will and testament, dated in the year 1818, directed that certain lands therein mentioned should be sold by his executors. After the death of the testator the executor sold the land. The defendant Murdock, was the purchaser, and the bond now the subject of suit was given for the purchase money. Subsequent to the sale of the land proceedings were instituted in the court of ordinary to have the will proved in solemn form. The ordinary decided against the will. The executor appealed, and the appeal was tried in the court of common pleas for Marlborough district, and the jury found against the will, on the ground of the insanity of the testator at

the time of making the will. The defendant had taken titles from the executor, and had remained in the quiet and peaceable possession of it ever since.

HUGER, J. who heard the cause, ordered a nonsuit, on the ground that the verdict of the jury having established the insanity of the testator at the time of executing the will, all the acts of the executor by virtue of the authority of the will were void.

Ervin, for the plaintiff, moved to set aside the nonsuit.

Robbins, contra.

CURIA, *per* NOTT, J. The question submitted is, whether the plaintiff is concluded by the judgment of the ordinary, and the verdict of the jury, on appeal from his decree, from denying the insanity of the testator and his consequent want of authority to sell?

The executor derives his powers *over the goods* of his testator from the grant of the ordinary, but not so with regard to *lands* devised, or an authority to sell lands. These the devisee takes directly under the will, and immediately from the testator. The fee cannot be in abeyance, and on his death it vests *eo instanti*. Vide Bac. Abr. Tit. Executors and Administrators, E. and note, (1.) It follows therefore, that the ordinary has no jurisdiction over the lands, and however competent he may be to the determination of questions affecting them incidentally, as that the testator was insane, or the will forged, he can make no order, or give judgment with respect to them, which will be binding on either the immediate parties to the contract or others; and it follows as a consequence, that his judgment is not conclusive so far as the real estate is concerned. If he allows the will, his probate is not evidence against the heir at law. The original must be produced and proved. If he rejects it, the devisee, for the same reason, will be permitted to set it up in opposition to the heir.

These positions are not denied; but it is contended that a jury has pronounced on the insanity of the plaintiff's testator, and for that reason he is concluded. But it must be recollected that the powers of the court of common pleas in respect to this matter is entirely appellate, and is conferred solely with the view of controuling the ordinary in the wilful, ignorant, and corrupt administration of justice, and in the end is only authorative so far as to put him right when he has erred.

A will is propounded for probate in the court of ordinary, it is rejected on the ground that it was forged, or that the testator was non compos, an appeal lies directly to the court of common pleas, where a jury is charged to try the question, and although by the practice of the courts in this state, the trial is gone into de novo as regards the object, the power is appellate, and the ordinary is bound to conform his judgment to the finding of the jury: so that, it is but the judgment of the court of ordinary allowing or disallowing the will corrected by an appellate tribunal.

Let us suppose that the result of this case had been different, and that the jury had found for the will, and under that finding the ordinary had admitted it to probate, would that probate have concluded the defendant from going into evidence to prove that the testator was insane? Surely not, if the rule that the devisee derives his title to the lands immediately from the testator, and not through the ordinary, is to prevail, and if the probate would not be evidence, his judgment rejecting it would be equally inconclusive. Reasoning from these premises, the conclusion necessarily follows, that the plaintiff was not estopped by the judgment, and the same conclusion will I think result from another view of the case.

It is amongst the peculiar properties of an estoppel that it must be reciprocal and equally binding on both parties, for if a stranger to the record might plead it as an estoppel

against one who is a privy to it, the privy might plead it against a stranger, and thus one who had no opportunity of being heard, and who perhaps has evidence not before adduced, would be concluded. Com. Dig. title Estoppel B. note *n*. Now the ordinary had no jurisdiction on the subject of the devise in question. The defendant was therefore neither party nor privy to those proceedings in any sense of the term, consequently he could not have been estopped by the judgment ; for although a question incidentally affecting his title, may have been determined he might answer in an action calling his title in question, that he had no opportunity of defending his title, and that he had in his power conclusibe evidence to establish the converse. As the defendant was not estopped, it follows that he cannot use it as an estoppel against the plaintiff.

Nonsuit set aside.

M'CAW VS. KIMBEL.

Where cotton is sent to a gin to be ginned the owner of the machine is bound to take the same care of it that a prudent man would bestow on his own, and of course is only liable for ordinary neglect.

Where the defendant's gin house was burnt by the negligence of his servants, he was held answerable for cotton sent there to be ginned.

DUBOSE vs. WHEDDON.

A note given by an infant for necessities is valid.

This was a summary process on a note of hand. Plea non assumpsit and infancy. Issue taken on the first, and replication to the second plea, that the note was given for necessities.

HUGER, J. decreed for the defendant on the ground that a note given by an infant, even though for necessities, is void. Plaintiff appealed.

Wilkins, for the appeal.

Dargan, contra.

CURIA, *per* NOTT, J. The only question in this case is, whether an infant can bind himself by a promissory note for necessities. It is a little remarkable that a question of such frequent occurrence should remain to be settled at this day. But I think that although the decisions on the subject are some what contradictory, there can be but little doubt on the question now immediately before us. Lord Coke says, that an infant cannot bind himself in a bond with a penalty, even for necessities. 171-2. From whence it has been inferred that a single bill without a penalty would be good, 3 Co. 172—and it is there said that it has been often so adjudged—see *Ayliff vs. Archdale*, Cro. Eliz. 920; *Earle vs. Peale*, 1 Salk. 387; 3 Bacon 594-5. And if an infant can bind himself by a single bill, it would seem to follow as a necessary consequence, that he may bind himself by a simple contract. But in the case of *Williamson vs. Watts*, 1 Campbell 552, in an action of assumpsit on a bill of exchange, where the defendant pleaded infancy, and the plaintiff replied necessities, Sir James Mansfield said the replication was nonsense; and asks emphatically whether any one ever heard of an infant being liable as acceptor of a bill of exchange. And in the case of *Trueman*

vs. Hurst, 1 Term Rep. 40, it was held that an infant was not liable on a negotiable note, nor an account stated, but I cannot see the good sense of the rule, and if I am permitted to use as strong language as Sir James Mansfield I would say it is nonsense to hold that an infant may bind himself by a single bill and not by an account stated.— Judge Reeve, in his treatise on Domestic Relations 230-1, lays down the rule, that “when the security is of such a nature that by the rules of law, the consideration cannot be inquired into, then the infant is not liable,” from whence it is concluded that he is not liable on a bond or negotiable note after it is negotiated, but that he is liable on a note given for necessities, provided it be not negotiable and even on a negotiable note while it remains in the hands of the original payee. I have no doubt of the correctness of this conclusion, and that is enough for our present purpose. I can see no reason why he may not be bound by a bond or bill of exchange. It is not true that no inquiry can be made into the consideration. The statutes against usury and gaming are every day set off as defences to actions on bills of exchange and negotiable notes, even in the hands of innocent indorsees. And in addition to those cases, no defence is more common in our courts to an action on bond, than a failure of consideration. If infancy can be pleaded to an action on bond, or on a bill of exchange, why may not a replication that the contract was for necessities, be allowed? However, it is not my intention to go beyond the case now under consideration. I think the replication ought to have been sustained, and the decree must therefore be reversed.

Decree reversed.

CLARK ads. M'DONALD.

Plaintiff's slaves were drowned, by an accident happening to defendant's steamboat, he being a common carrier, and the slaves being passengers. Plaintiff brought suit for damages. The judge charged the jury that defendant was liable for the loss of the slaves in the same manner as he would be liable for the loss of goods. Verdict set aside for misdirection.

There is a distinction between the liability of a carrier with respect to the transportation of a slave and a bale of goods.

The question should have been submitted to the jury, whether the accident happened, by the negligence of the carrier, or the act of the slave, or by unavoidable accident.

This action was brought to recover the value of a negro woman and her child, the property of the plaintiff. The defendant was the captain of a steam boat, on board of which the negroes were sent as passengers from Charleston to Georgetown. The boat came to anchor in one of the creeks which form the inland passage between those towns. In the course of the night, when the tide ebbed, the boat rested partly on a bed of oyster shells, in consequence of which she filled with water, and the negroes being under deck were drowned. It appeared that captain Clark used all necessary diligence to avoid accidents. He had a pilot on board and when the boat anchored, head and stern, a regular watch of two persons was set. His honor Judge Huger who tried the cause at Chesterfield, charged the jury that there was no difference in the liability of the defendant as captain of a steam boat, for the loss of the slaves, than for the loss of bales of goods, and the jury found for the plaintiff the value of the slaves.

Evans, for the defendant moved for a new trial, on the ground that the charge to the jury was erroneous.

Coit, contra.

CURIA, *per* JOHNSON J. It is conceded that the defendant in respect to this case stands in the relation of a common carrier, and the universally received doctrine of the

common law is that he is liable for all losses on goods committed to his care, for transportation, except such as arise from the act of God or public enemies. To the former of these are referable all losses arising from causes over which the carrier had no controul, and against which no human skill or prudence could guard. Losses arising from all other causes are imputed to the carriers negligence. This is the general doctrine, but it is obvious that on enquiring into the causes from which a loss has resulted, to enable us to refer it to its proper class, regard must be had to the nature of the employment, and the thing to be transported. The carrier by water is exposed to a variety of accidents from which the carrier by land is exempt. Storms and tempests beset him, shoals and quicksands obstruct his trackless path, and numberless other causes of destruction lie hid from human observation. And so with respect to the thing to be transported. It may be very indestructable, or so destructable as to be liable to self decay. And rigid and inflexible as is the rule with respect to the liability of common carriers losses from causes derivable from the nature of the thing itself, are referred to the act of God. They are regarded as inevitable.

There is a distinction then between losses arising from extrinsic causes and intrinsic causes attributable to the nature of the thing itself; and I apprehend that upon examination it will be found that the same distinction exists between moral and physical causes.

Admitting the rule to the whole extent contended for, let us take the case under consideration for an illustration.

* The plaintiff employed the defendant to carry a negro woman slave and her child on board his steam boat from Charleston to Georgetown, by virtue of which undertaking he was liable, if they were lost from any other cause than inevitable accident. Let it be recollected that this wo-

man is a human being, and possesses reason. Can the carrier restrain or control the operation of her mind?—She wills her own destruction or escape, can he prevent it? She possesses the power of locomotion, shall he bind her in fetters or confine her in the hold of the vessel? This would prevent her escape, but it is unusual, and would expose her to greater danger in case of wreck or other accident, which might be imputed to him as negligence. Here then is a class of cases over which the carrier possesses no more controul than he does over those which are attributable to the act of God. The operation of moral as well as natural causes, are equally beyond the reach of physical power, and must alike be referred to that class of accidents which are denominated inevitable.

There is then a radical distinction between the liability of a carrier with respect to the transportation of a slave and a bale of goods. The latter has neither the power of volition or of motion, and is completely under his controul. The former is operated upon by moral causes, the latter only by physical, and of necessity this distinction must be kept in view in the application of the rule. But it is said that the rule is one of rigid policy founded on the supposed difficulty the owner must encounter in ascertaining the truth as to the manner in which the goods were lost, and the facility possessed by a carrier of combining with thieves to purloin them, and that these reasons apply with equal force to the subject now in controversy as a bale of goods. Whilst I am constrained to bend to the general rule of law, I must acknowledge that I have never been able to discover the good sense of the reasoning on which it is founded. The contract to carry imposes the obligation on the carrier to deliver the goods, and if he does not it is incumbent on him to show some reason or excuse why he has not done so. The onus is thus thrown

on him, and if he is competent to show to demonstration that the loss occurred without his fault, as that he had been beset with an overwhelming force, and been robbed without covin or fraud, my powers of reasoning are unable to distinguish between the justness of such an excuse and one arising from inevitable accident, or that all the dangers apprehended from unfairness might not be sufficiently guarded against by the strictness of the proof.— But it is sufficient for the purposes of this case that causes may exist which will excuse the carrier, and of which he may be permitted to give evidence. The act of God, or the public enemy.

Again. It is said that the danger of combination to inveigle or purloin, is incurred by the circumstance that a slave has the power of reasoning and of locomotion; but it must be recollected that these same faculties include a still greater counteracting influence. The moral and physical influence of which it is capable, as well as the probability of exposure and detection, greatly outweigh any danger from that source.

I have looked in vain for cases bearing an analogy to the question made here, and in the absence of any I have had recourse to principles which appear to me unexceptionable, and have exercised the best of my judgment in deducing a conclusion from them; and the result is a conviction that in the foregoing particulars, and perhaps many others, a distinction exists between the liability of a common carrier with respect to the subject matter of this suit and goods generally.

The cases of *Rutherford vs. M'Gowen*, 1 Nott and M'Cord 17. *Cook v Gourdin*, 2 Nott and M'Cord 19, and *Miles vs. Johnson*, 1 M'Cord 157, which are supposed to bear an analogy to the question now under consideration, will be found upon examination not to touch the principle. These were all actions against the owners of fer-

ries for the loss of horses in their transportation across rivers in which the court lays down the rule generally, that their liability is placed on the same footing with respect to that description of property as it is in regard to things inanimate; yet in all of them it will be seen there were circumstances of negligence. In the case of *Rutherford vs. M'Gowen* the loss arose from the insufficiency of the chain which confined the boat to the shore. In *Cook vs. Gourdin*, the attempt to pass the river was at high water and the crew abandoned their poles and oars. And so in the case of *Miller vs. Johnson* the utter recklessness of the man who had charge of the ferry, and the difficulty in entering into the boat in consequence of the want of the necessary conveniences and preparations are thrown into the scale of the principle on which the court proceeds, and I think it is yet to be settled how far a ferry owner is liable when he is entirely faultless. Admitting the rule however as laid down in those cases there is still a glaring distinction arising out of the difference in the character of the two species of property. The want of volition in the one subjects it more immediately to the controul of man, whilst the rod of omnipotence alone can impose a check on the operation of the human mind or controul its action.

This case comes up on a report drawn up by the counsel unaccompanied by the particular circumstances and unexplained by the particular views of the presiding judge, except as to the abstract question which has been submitted, and I have found great difficulty in applying the principles to it. If the case had been put to the jury on the question whether in fact the loss occurred by the negligence of the defendant, or the act of the slave herself or from unavoidable accident, proceeding on the practice of the court, the verdict would have been regarded as conclusive, although the judge had erred in a specula-

tion on an abstract question of law. But it is possible that the jury may have been misled by it and for that reason a new trial is ordered that the facts may be again investigated with reference to the principles laid down.

GOLCOCK, J. dissented.

New Trial Granted.

BYRD, Trustee, vs. WARD.

Upon marriage of a daughter, the mother (the father and husband not being present,) sent a negro with her daughter to assist her and to return after a while. But the slave is permitted by the fatherinlaw to remain with the soninlaw upwards as his own property, and was so considered by every one, the father in the mean time making no claim. Held that it amounted to a gift to the soninlaw.

The negro being levied on under executions against the soninlaw and sold, the purchaser obtained a good title.

Though the father may have intended the property for his daughter's sole use, yet after suffering it so long to appear to the world as belonging to his son-in-law, it would be fraudulent to suffer him to convey the property in trust for his daughter, in exclusion of the rights of creditors.

Allen in 1816 married Leah Byrd, the daughter of Benjamin Byrd; and when they were about to move home, Mrs. Boyd told two of the negro women to go home with Mrs. Allen to assist her. One was to return shortly, the other to remain longer, to help her, neither to stay very long. The witness who heard this did not consider them as a gift. Neither Allen nor Byrd, the fatherinlaw, were present. One of the negroes sometime afterwards returned home. The other remained for four years in the possession of Allen, and was considered by every person in the neighborhood as the property of Allen. He sometimes said the negro was his own and then said she belonged to his wife. Allen becoming indebted or insolvent, the father Byrd executed a deed of trust of the negroes to the plaintiff for the use of his daughter

Mrs. Allen. The negro was levied on under executions against Allen and sold and bought by the defendant. This was an action of trover by the plaintiff for the recovery of the negro. As all of the important points of the evidence are recited by the court, the Reporter has not repeated it.

The jury found a verdict for the plaintiff.

This was a motion for a new trial.

Farrow, Irby and Earle for the appeal.

O'Neill and James contra.

CURIA, *per* NOTT, J. The principles by which this case is to be governed have been so often recognised by this court that it is unnecessary to add any thing to what has already been said on the subject. Permitting negroes to go home with a daughter on her marriage has always been considered as *prima facie* evidence of an unconditional gift, and the only question now for our consideration is whether the circumstances of this case make it an exception to the general rule? Mrs. Hill a daughter of the donor and Mr. Byrd the donor himself are the only witnesses from whom we derive any knowledge of the nature or circumstances of the gift.

Mrs. Hill says "that when Allen married and was about to remove, her mother, Mrs. Benjamin Byrd, told two negro girls as women to go and help Leah, his wife, one was or return shortly the other to remain longer to assist her, neither to stay very long. Her father was not present. Witness did not expect they went to stay long or that they were Allens."

It will here be observed, that neither the donor nor the donee were present at this time. No contract, therefore, was then made, nor the tenure prescribed by which the donee should hold the property. It was a mere act of kindness on the part of the mother to her daughter who was about to commence house keeping; and if the negroes:

had returned, as was then expected, within any reasonable time, it would have been considered as it is now contended on the part of the plaintiff as a legitimate loan; and no question could have arisen with regard to the right of property. One of these women afterwards returned to the family of the donor, and has ever since continued with him. The other continued in the possession of the donee for four years; was claimed and used as his own during that whole period, without the interposition of any right or claim on the part of the father in law. Such a length of possession would have given a statutory right, and would be conclusive evidence of the intention of the parent; and that view is strengthened by the circumstance that at the end of four years instead of reclaiming the property as a loan he executed a deed of trust to the plaintiff for the use of his daughter, who it seems to be admitted, was the original object of his bounty. If it was intended as a gift to his daughter it immediately vested in her husband by the operation of law, and although he might, as I regarded his own right, afterwards consent that it should be made over to trustees for the benefit of his wife, he could not by a voluntary settlement defeat the just rights of creditors. The inference therefore from this state of facts is that the property must be considered as belonging to Allen and subject to the payment of his debts. Let us now see whether the testimony of Mr. Byrd himself will lead to a different conclusion? He says he never intended to give them to Allen and never did so. He admits that they went into his possession in the manner stated by Mrs. Hill, and that he never claimed them from him nor called on him for them. His reasons for not giving them were, first, because he did not consider them as his own; and secondly, because Allen was embarrassed. With regard to the first there is no doubt but that he had a good right himself, but suppose his right to be doubtful,

if he intended to give all he had, as between himself and the donee, it would be a good gift. As to the second, it may have been a good reason with him why he should not have given the property; but if the circumstances attending the transaction were in point of law such as to constitute a gift no mental reservation of a contrary intention should controul their operation. There must have been some express stipulation at the time, distinctly understood by both parties, in order to give effect to such an intention. It is not therefore a question what he intended, but what he actually did. If a man give property to his daughter and the heirs of her body the law will construe it into an absolute gift, although he intended it to have a different effect. We are bound therefore, from Mr. Byrd's own testimony to consider the property as actually vested in Allen. All the other testimony goes to strengthen this view. The purport of it is that Allen had the undisturbed possession of it until the deed of trust was executed. He had during that whole period the sole and unqualified use and enjoyment of it and was to all intents and purposes the ostensible owner. This analysis of the evidence leads to the inevitable conclusion that as to creditors he must be regarded as such. And when we look at the circumstances in the aggregate they present a view of the case which cannot be mistaken. Mr. Boyd had no great confidence in his son in law. He was, as he expressed it, a trading and extravagant man. He nevertheless intrusted him with those negroes without any stipulation, as to the tenure by which he was to hold them. Allen had a right to consider them as his own, and every body else had a right to consider them as such. Mr. Byrd may have supposed he had a right to controul their future destiny if circumstances should render it necessary, but in that he was mistaken; and if Allen had turned out an economical, industrious, man, prosperous in his business,

it is manifest that he never would have interfered; for it was not until he was broken or about to break, that the deed was executed. Then it was he found that Allen could no longer be trusted, and then it was, it appears, that for the first time, he found it necessary to carry his intention into execution, of making a separate provision for his daughter, and to put the property equally beyond the control of her husband and the grasp of his creditors. But he began too late. He had contributed to hold him out to the world as the owner of the property, and it would be a palpable fraud upon his creditors, who had thus been invited to place confidence in him to take from them the security to which they had trusted with the consent of the donor himself.

It has been contended that there is no evidence that Allen was insolvent at the time the deed of trust was made. But his property is estimated by the donor himself at that time at only about fifteen hundred or two thousand dollars, and he does not know the amount of his debts. It is in proof that he was indebted to the bank, for which the defendant was surety, six hundred dollars. That shortly afterwards he borrowed five hundred dollars more and that the donor himself considered him in failing circumstances; and I believe that no case can be found where a voluntary deed under such circumstances has been held good against existing creditors.

But let us go one step further and suppose that it had been distinctly understood between the parties that this should have been a loan and that the donor might retake the property at any indefinite period. Although such a contract might possibly be good between the parties it is a question worthy of consideration whether it could effect the rights of creditors. I do not intend to make it a ground for a new trial in this case, yet I think it a question which ought not to be overlooked in deciding cases of this

sort. Most of the cases, which we have hitherto had, have been between the donor and donee, or persons claiming in the same right, and in those cases the inclination of the court has been strongly in favor of the donee, and the claim is still stronger when the rights of creditors are involved. I am not opposed to allowing to parents the most liberal indulgence of their affection for their daughters in making ample provision for them. Every person ought to be at full liberty to do as he pleases with his own, and no parent is under any obligation either legal or moral to place at the disposal of a profligate son in law the provision which he is disposed to make for his daughter. The laws of nature require that it should be at his own disposal, and the laws of the land do not forbid it. But they have prescribed the method by which it ought to be done so as not to do injustice to others, and require that men should be just, as well as kind.

I am of opinion that the verdict in this case is contrary both to law and evidence and that a new trial ought to be granted.

New trial granted.

Ex parte GILCHRIST.

The Court of Common Pleas have no power under a writ of Habeas Corpus to discharge a person in custody, under a writ of ne exeat issued from the Court of Equity.

This was an application to one of the Judges of the court of Common Pleas, for the discharge of the prisoner under a writ of habeas corpus. It appeared by the return of the Sheriff, that the petitioner was detained in his custody under a writ of ne exeat, issued by the commissioner in Equity for Chester district. The plaintiff's counsel contended that the bill filed, upon which the Commissioner

had issued the writ, did not make out a case in which the Court of Equity had the power to order a writ of ne exeat.

HUGER, J. who heard the application, refused to look into the bill or to grant a discharge.

A. W. Thomson, for the petitioner, now made the point before this court.

Chesney, same side, contended that the prisoner was entitled to be heard *ex debito iustitiæ*. It is in nature of error, to ascertain the legality of a commitment. Blac. Com. 134, 376, 129. His honor said that the matter was to be judged of by the return of the Sheriff, and that he would not investigate the matter of it. The only possible method to ascertain the legality of a commitment is to examine into the facts of the case. Unless the party is heard, there is no benefit in the Act to him. Was there any authority to shew that the court of common pleas cannot hear a habeas corpus, because the prisoner has been committed by the court of Chancery? He cited Addis' case, Cro. Jac. 219. Yeates vs. Lansing, 4 John. Rep. 417. Vent. 357. Vaugh. 153. Salk. 350.

CURIA, *per* JOHNSON, J. The act of 1808, 1 Brev. Dig. 212, tit. Court of Equity, sec. 76, invests the commissioner in equity with the power of the Chancellor in relation to granting orders for the writ of ne exeat in all cases of practice; and the petitioner claims to be discharged from an imprisonment to which he is subjected by a process sued out in pursuance of this authority, on a writ of habeas corpus issued by a judge of the superior courts of law. In the organization of the judicial department of the government, certain powers were assigned to the different tribunals, corresponding with the nature and extent of the jurisdiction confided to them; and in the exercise of these powers, except so far as the right of appeal is given, the most subordinate are as absolute and authoritative as the tribunals in the last resort. The

judgment of a Justice of the Peace in a small and mean cause is as binding on the citizen as the judgment of this court; and I should deprecate even more than the repeal of the habeas corpus act, that state of things in which tribunals without the forms of law would be permitted to review and controul the judgment of each other ad libitum. The habeas corpus act certainly confers no such power. Its object was to secure the citizen from illegal and arbitrary imprisonment; and the wildest speculations have never yet carried it so far as to subvert all law and order. For even in the case of *Yates vs. Lansing*, 4 John. R. 317. 5 Do. 282. 6 Do. 337, than which perhaps no case was ever more warmly contested, the bone of contention was whether the Chancellor had jurisdiction over the subject matter for which he caused the plaintiff to be attached.

In this case the law confided to the commissioner the power of granting the writ of ne exeat. The petitioner is therefore confined and imprisoned according to the strict forms of law; and the presiding judge had no more power to discharge him than the commissioner would have had to discharge a culprit committed for execution by a court of sessions.

Motion refused.

JUDGE VS. CLOUD.

The 83d rule of court which requires a defendant in an action of trespass to try titles, to set out his title specially if he intends to claim, has become obsolete.

This was an action of trespass quare clausum fregit.—His honor Judge Waties held that the defendant was bound to *plead* his title *specially*, to enable him to give it in evidence in pursuance of the 83rd rule of court. The defendant appealed.

Clarke, for the appeal.

Williams, contra.

CURIA per COLCOCK, J. The rule referred to by the presiding judge has no application to the action of trespass *quare clausum fregit*. It was intended, as it expresses, to apply to those actions which are brought to try the titles to lands, and by which the rights of the parties are to be definitively settled. There is no doubt that the defendant had a right to go into the defence which he had set up. The purpose for which the 83rd rule was intended, was to prevent a repetition of suits, which frequently occurred before our late decisions, when the subject of possession was not so defined as to enable a jury to point it out by their verdict ; and if the defendant depended on his possession alone a verdict for him could not define the boundaries of his right, and thus it often happened a second suit was commenced. But as one in possession is now permitted to claim to the extent of the boundaries actually made, or to those of any written claim, we cannot anticipate many cases in which the possessor will be confined to the mere spot on which he lives, or on which he cultivates. There is therefore, no further necessity for the rule, and it may be considered as abolished.

New trial granted.

DANIEL VS. CAPERS, Sheriff.

An attachment for contempt in not paying over money on an execution or for not collecting it, is in effect a civil proceeding, by which courts compel their officers to indemnify suitors for losses sustained by neglect of duty.

If the party elects to proceed by attachment and receives the principal of the debt he cannot afterwards bring an action against the sheriff for damages for the detention.

As a condition to his discharge from an attachment the court may add that the sheriff should pay interest on the money during the period of the detention. But not having done so the plaintiff cannot bring suit to recover interest by way of damages.

This was an action against the defendant, who was sheriff, for neglecting to collect the money due on an execution for the plaintiff lodged in his office. The execution had been renewed twice, and while the third renewal was in the hands of the sheriff, he had been ruled and finally an attachment issued against him. He was arrested and he paid off the principal sum due on the execution, and was discharged. The execution had been two years in his hands and this suit was brought to recover damages for the detention or neglect in not paying over the money during that time. The jury found damages for the whole time that the execution remained in the hands of the sheriff.

Miller, for the sheriff, moved for a new trial on the ground that the judge who tried the cause had erroneously charged the jury that they should find damages for the whole time, as the plaintiff had twice renewed the execution. The plaintiff had also elected his remedy. He had proceeded against the sheriff by attachment for this same matter and had received the principal and had consented to the discharge. He could not now proceed in this action for the same cause. 1 Hen. Bl. 233. 2 Bay 193. Heppell vs. King, 7 T. R. 366.

Hart, contra.

CURIA, per JOHNSON, J. The proceeding by attachment against an officer of the court for a neglect of duty is

a substitute for amercement, in which the offender was punished by a fine to the king and in which the remedy of the party injured was on petition to the king to be indemnified out of the fine imposed; and the inconvenience of this mode of proceeding was the reason why the attachment, in which the court have the power to compel him to do justice to the injured party, has been substituted in its place. *The King vs. the Sheriff of Middlesex*, 1 H. Black. 543. And the court will in its discretion compel a sheriff to pay the whole amount of the plaintiffs loss and all costs that have accrued. *Ibid.*

It appears then that an attachment as for a contempt is in effect a civil proceeding of a summary nature, by which courts of justice compel their officers to indemnify individual suitors for losses sustained by neglect of duty. To this remedy the present plaintiff has had recourse, and the question now is whether he can have a further satisfaction? I think not. It is a fundamental principle that a party is not entitled to more than one satisfaction for the same injury.

However often the mode of recovery may be varied, in the proceeding had the court might as before shown have compelled the defendant to do ample justice to the plaintiff and the presumption is that it did, and in its discretion might have superadded, as a condition to the discharge of the attachment, interest on the amount due him; or if the plaintiff had thought proper to have proceeded by action at law he might have recovered it. But having elected to proceed by attachment his wrongs are repaired and he can have no further remedy.

COLCOCK, J. I concur, except that I think a judge could not give interest on a rule.

New trial granted.

DUNCAN VS. HODGES.

The general rule is that if a blank piece of paper be signed, sealed and delivered, and afterwards written it is no deed, as there is nothing of substance in it.

A deed executed with blanks, and afterwards filled up and delivered by the agent of the party is good.

The plaintiff signed and sealed a printed deed of conveyance of a tract of land, which was attested by two witnesses, and left by the plaintiff with his agent to be filled up, whenever the defendant who had agreed to buy it, should execute a bond for the purchase money. The defendant being ready to give his bond and to accept the deed, the agent filled up the blanks conveying the land to the defendant, and delivered it to him, who accepted it and gave his bond for the purchase money. This was an action of debt on the bond, and the defence was that the deed was void, neither the grantor nor the subscribing witnesses being present when it was filled up and delivered. The defendant relied on the case of *Boyd vs. Boyd*, 2 Not and M'Cord 125.

JAMES, J. who tried the cause, charged the jury in favor of the defendant, for whom they found a verdict.— The plaintiff appealed.

Noble, for the appeal, cited Blac. Com. 307 ; Com. Dig. Fait A (1.) The grantor could not avoid the deed. It would be an estoppel to him.

/ *M'Craven*, contra. *Boyd vs. Boyd* was exactly in point. 1 Shep. Touch. 59. The authority to fill up the blank should have been in writing. The deed was the mere substitute for livery of seizen, which required two witnesses. But here there was no witness to the delivery or necessary part to consummate the deed.

/ CURIA, per JOHNSON, J. The general rule is, that if a blank be signed, sealed and delivered, and afterwards written, it is no deed, and the obvious reason is, that as

there was nothing of substance contained in it, nothing could pass by it. But the rule never was intended to prescribe to the grantor the order of time in which the several parts of a deed should be written. A thing to be granted, or person to whom, and the sealing and delivery, are some of those which are necessary, and the whole is consummated by the delivery ; and if the grantor should think proper to reverse this order in the manner of execution, but in the end makes it perfect, before the delivery, it is a good deed. Thus it is said, that if a deed be made with blanks, and afterwards filled up and delivered by the agent of the party, it is good. *Anst.* 229. *Com. Dig. tit. Fait. A.* (1.) note (f.) *Day's ed.* It is not pretended that this deed was not perfect as to form at the time it was delivered by Gray, the plaintiffs agent ; or that he was not instructed by the plaintiff to fill up the blanks and deliver it. And according to this authority the deed is good. In another view I think the same consequences follow. It is not necessary in all cases that the grantor should in person make delivery of the deed. It may, says Sheppard, be delivered by another, by his appointment, or authority precedent, or assent or agreement subsequent ; for *omnis rati habitio mandato aequiparatur*. 1 *Shep. Touch.* 57. And admitting that the deed on account of the manner of its execution and the informality of the delivery was void, yet the plaintiff is bound by his subsequent assent to the execution, manifested by his accepting and claiming the benefit of the contract growing out of it, and he will not be permitted to gainsay or controvert it. It would be a fraud on the defendant which could not be tolerated.

New trial granted.

CHESHIRE VS. BARRETT.

Contracts with Infants are void or voidable. Those which are voidable only impose a qualified obligation, and if the infant after coming of age elect to perform, it will be enforced against him.

A very slight circumstance shewing his assent to the contract, after the infant comes of age, will confirm the contract.

If he purchases land and continue in possession after he comes of age, and if he buys a horse which he retains and uses after he becomes 21, it will amount to a confirmation.

Where an infant gave his note for a horse, payable to A. or bearer, and kept the horse after he became 21, and sold him, it was held a confirmation, and that the *bearer* of the note, to whom it had been transferred, might recover it.

This was a summary process on a note, which had been given by the defendant while under age for a horse. In answer to the plea of infancy the plaintiff replied that the defendant had confirmed the contract after he came of age, by keeping the horse and selling him. It was urged that this was not a confirmation of the contract, but that if it were it would not enure to the benefit of the plaintiff, who was not the original payee, but the bearer only of the note. The original party to the contract alone could take advantage of the confirmation.

GANTT, J. who heard the case nonsuited the plaintiff.

Bauskett and *Dunlap*, for the plaintiff, appealed. They cited 3 Bac. tit. Infancy (i) 2 Vern. 228; 4 Cruise, 3 art. tit. 32. ch. 8, sec. 7.

O'Neill and *Johnston*, contra.

CURIA, *per* JOHNSON, J. The first ground of this motion necessarily involves two distinct propositions, 1st. Whether this is such a contract that the defendant could bind himself to perform it by a reassumption after he attained full age; and 2dly. Whether the act done amounted to a reassumption.

The supposed incapacity of infants to judge of the value of property, or its fitness for their use, and the danger to which they are exposed from the arts and devices of bad man, is the foundation of the rule which exempts

them from liability on contracts made by them during their infancy. But when they have attained full age, and are capable of exercising a matured judgment in the review of past transactions, they may, without violation of the principle, be permitted to affirm or disaffirm their contracts. They are then supposed to be competent to determine how far these contracts have been beneficial, and how far injurious, and having made the election to be bound or not, the law in most cases will confirm and enforce it; and keeping this principle in view, I will proceed to the investigation of the first proposition.

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Contracts entered into by infants are classed into those that are absolutely void and those that are voidable. With respect to the former it is very clear that no subsequent confirmation short of actual performance can bind, for the obvious reason that a void contract imposes no obligation, and it being itself without foundation, no superstructure can be raised upon it. Those which are voidable only are in law supposed to impose a qualified obligation, and having elected to be bound by it the performance will be enforced. In all cases of this sort it is therefore a primary consideration to determine to which of these classes the contract belongs. The rules extracted by Bingham in his treatise on the Law of Infancy 67 are, that all gifts, grants, or deeds, made by infants which do not take effect by the delivery of his hand, are void, but that all gifts, grants, or deeds made by him by deed or matter in writing, and to take effect by delivery of his hand, are voidable only. 2. That those acts are void in which there is no semblance of benefit to the infant. Those from which he may receive a benefit are voidable only. But he demonstrates I think very clearly, by illustrations drawn from decided cases, that the first of these rules is not sufficiently extensive for practical use and general application, as it embraces only

a limited class of contracts, and it is apparent that the latter could not stand with it; for if a gift, grant, or deed is voidable only because it takes effect by delivery, then the circumstance whether he did or did not derive a benefit from it must be unimportant, and he comes to the conclusion in which I am much disposed to concur, that "perhaps it may not be unsuccessfully contended at this day that few if any of the contracts of infants are absolutely void."

Judge Reeve, in his treatise on Domestic Relations 250, has I think in some degree supplied the deficiency of the old rules on this subject. He proceeds on the principle that this protection is a privilege to the infants and that his contract must be so regarded as to give him the full benefit of them, and if he cannot have it without their being regarded as utterly void, then it would be so considered. And he illustrates this rule by a case from Keeble, where a barber contracted with an infant for all the hair on her head, and in pursuance of the contract, with her consent cut it off, and it was notwithstanding held that she might maintain an action for forcibly cutting the hair from her head. Here it would seem that both the contract and consent must have been regarded as void to enable him to maintain the action. Yet I am unable to perceive any reason why she might not have been bound by her affirmation of this contract after she came of full age.

In the pursuit of this inquiry we are met by the dictum that if one deliver goods to an infant on a contract to sell, &c. such delivery is in law regarded as a gift, because it is said an infant is incapable of making any contract. Bacon Abr. tit. Infancy, p. 1. 3. Hence it is concluded that such contracts are not only voidable but absolutely void, and that any confirmation or reassumption of the promise to pay is void for want of consideration. I should be wanting in candor if I pretended to supply from my own

resources any thing in addition to the very able and conclusive arguments of Judge Reeve on this question, in which he demonstrates most clearly that the dictum is unsupported by reason or authorities. "It is absurd to reason that a man who consented to part with his property for a stipulated price, intended it as a voluntary gift;" and it is believed that the contradictions and the confusion in the authorities on the question have arisen in pursuing this doctrine, and at the same time laboring to get rid of it. The result of my own reflections after a good deal of labor bestowed on the subject, is that in general there is but little distinction in this respect between contracts entered into by adults and infants. Contracts immoral in their tendency, or against law, or without consideration, are void by whomsoever they may be made, and no undertaking based upon them can bind. Those based upon a moral, legal, and valuable consideration bind adults.

The policy of the law permits an infant to avoid them, but if after arriving at full age he thinks proper to affirm them he ought to be bound. The moral obligation is sufficient consideration to support the new undertaking. A power delegated by an infant is said to be an exception; but when the ingredients of a binding contract has entered into the new undertaking, I am reluctant to admit even this exception.

The case of *Counts vs. Bates*, Harper's R. 464, relied on by the counsel opposed to the motion, is not inconsistent with this conclusion. In that case there had been no confirmation of the contract by the infant. The defendant, his administrator, was not competent to make or affirm a contract for him. He could not bind the estate by any contract of his. In making the contract the plaintiff took upon himself the risk of a subsequent confirmation, and was bound to abide by the result. No injustice consistent with the protection which the law allows to infants was

done to him. The rules with respect to what shall amount to a confirmation of a contract made by an infant, after he attains full age are better ascertained. A very slight circumstance demonstrating his assent, will bind him; or any act by which his assent is manifested. Thus if an infant purchase land, and continue in possession after he attains full age it will be regarded as a confirmation of the purchase. 1 Salk. 20. 4 East. R. 599. Or if he make exchange of lands. Co. Lit. 26; or if he take a lease rendering rent, and continue in possession several years after he comes of age, it is a confirmation of the contract ab initio, and he is bound for the rent in arrear. Cro. Jac. 324. In short any word or action from which his assent to the contract may fairly be deduced, will be regarded as a confirmation.

In the case under consideration the undertaking of the defendant was founded on a valuable consideration. He derived a positive benefit from it. He might have availed himself fully of the protection to which he was entitled as an infant, by disaffirming the contract, and restoring the horse to the plaintiff. But he thought proper to retain and use him, and in the end to sell him and pocket the proceeds. It was a contract which according to the foregoing view he was competent to confirm, and his conduct amounted to a confirmation, The plaintiff was therefore entitled to recover.

On the remaining ground of this motion there can I think be no difficulty. The undertaking to pay to bearer constituted a part of the original contract. The act of confirmation was general and extended to the entire contract, and must be regarded as having relation back to its origin, as well in effect as in form. The action was therefore well brought in the name of the present plaintiff.

Decree reversed.

O'NEAL VS. DUNCAN.

Where a tract of land was sold by the sheriff under an execution against the defendant, in an action of trespass to try titles, by the purchaser against the defendant, the defendant will not be permitted to give evidence that the title of the land was not in himself, but in another whose tenant he was.

The Sheriff's title, (being the organ of the law to convey the defendant's right,) is considered as the deed of the defendant, and operates as an estoppel.

BYRD VS. BOYD.

When a Planter without good cause turns away his Overseer, at a season of the year when it is impracticable to get employment, and his time is wholly lost, the overseer ought to recover the whole wages for the year. So if the overseer abandons his employer without cause, or by his neglect causes a loss equal to his services, he is entitled to nothing.

But where the planter reaps the full benefit of the overseer's services, and circumstances occur which justifies his discharging the overseer, not immediately connected with the contract, the overseer is entitled to compensation, so far as his services were properly directed.

This case should have been reported in a previous term, but being mislaid, is inserted here.

The plaintiff brought suit against the defendant, on a written contract for wages for one year, as overseer.—The contract was for \$180 for the year. The plaintiff managed the crop well, but in July he made use of abusive language to the defendant's daughter, for which he was turned away.

HUGHES, J. who tried the cause, charged the jury that the contract was entire for the year; that if the plaintiff had been properly turned away he ought to recover nothing. If the defendant had turned him off improperly the plaintiff ought to recover the whole amount.

The jury found a verdict in favor of the plaintiff for the whole amount of the year's wages. The defendant appealed.

Simpson and Dunlap, for the appeal.

Farrow and Irby, contra.

CURIA, *per* JOHNSON, J. The only ground necessary to be considered in this case is the supposed misdirection of the presiding Judge in charging the jury that they were not at liberty under any circumstances to apportion the compensation of the plaintiff to the services actually rendered, and that they were bound to allow him the stipulated wages for the year or nothing. I have found it very difficult to reconcile the cases on this subject, or to extract from them any satisfactory and well defined rule. The English cases go very far in establishing that contracts particularly with servants and seamen cannot be apportioned, and that the performance of the service is a condition precedent to the payment of wages, and they result in the rule, that when they are prevented from performing it by the misconduct of the master, they are entitled to the stipulated wages for the whole time, and converso, they are entitled to nothing if they abandon the service voluntarily. And yet the rule has been so far relaxed as to entitle the master to a deduction of any sum which a seaman may have earned in another vessel in the mean time. Abbot 392. 1 Com. on Cont. 362. This rule is evidently the result of expediency, especially as applied to seamen; and it becomes a question of some importance how far it is applicable to the subject under consideration. The relation of employer and overseer, is one which the state of the country renders almost indispensably necessary to every planter, and collisions do and must necessarily arise, and it is fit that there should be some settled rule on the subject. When the employer wantonly and without cause turns off his overseer, at a season of the

year when it would be impracticable to get employment elsewhere, and his time is wholly lost, I should feel no hesitation in enforcing the rule rigidly, not only as a punishment but as a just remuneration to the overseer, and so when the overseer abandons the employer without cause, or by his neglect inflicts a loss on him commensurate with the services which he has performed, he clearly deserves no compensation.

There is however a third class of cases for which it is necessary to provide, and which are perhaps of the most common occurrence. They are those where the employer reaps the full benefit of the services which have been rendered, but some circumstance occurs which renders his discharging the overseer necessary and justifiable, and that perhaps not immediately connected with the contract, as in the present case. It happens frequently too that it becomes a question of great difficulty to ascertain with whom the first wrong commenced. I cannot reconcile it to my notions of natural justice, that the overseer should not recover a compensation for the services, so far as they were directed, and which have been beneficial to the employer. And I am unable to discover any evil which is likely to result from submitting such a matter to the sound discretion of a jury of the country. And as a matter of expediency I should be disposed to establish it as a rule. This conclusion is I think supported by the principle of the exception before noticed, and by the common case in which a party is permitted to prove by way of defence, that owing to some defect in the execution of work and labor done and performed, the thing is not worth so much as was stipulated for; and the still more comprehensive principle, that a partial failure of consideration is a good ground of defence. Cases of this description are of very frequent occurrence, and although this question has never been judicially determined, it may be clearly collec-

ted from them, that the prevailing opinion is favorable to an apportionment. In some cases the jury have found the entire sum, but in most they have apportioned it when the circumstances justified it. Yet the point has never been adverted to by the bench or the bar, (vide *Crawford vs. Davis*, 2 Const. Rep. 403. *Clancey vs. Robinson*, 2 Const. Rep. and *Connelly vs. Irby*,) except in the case of *Cox vs. Adams*, 1 Nott and M'Cord 284, which is relied on in opposition to the motion. But by referring to that case, it will be found that the question was not made, nor is there even a dictum in relation to it.

I am of opinion therefore, that the case should go back on the ground of misdirection, unbiassed by any opinion of the court as to the facts, and it is ordered accordingly.

New trial granted. (a)

EAKEN VS. HARRISON.

A contract for overseer's wages is not an entire contract by the year. If the overseer has been turned off for misconduct, he may notwithstanding recover for the time he conducted himself properly.

The plaintiff brought his action to recover a year's wages from the defendant. He was to have received \$200 per annum, but was turned off by the defendant in April for misconduct.

The presiding judge charged the jury that if they thought the circumstances justified the defendant in dismissing the plaintiff, that they ought to find for the defendant, as the contract was entire for the year and the plaintiff should recover all or nothing.

(a) See the case of *Scott vs. Baldrick*, 2 Const. R. 410, and the next case of *Eaken vs. Harrison*, and *M'Clure vs. Pyatt*, ante, 26.

The jury found \$56 for the plaintiff.

Pearson for the defendant appealed, on the ground that the contract was entire and the jury should have found generally for the defendant. He cited *Clancey vs. Robertson*, 2 Const. Rep. 404. *Adams vs. Cox*, 1 Nott and M'Cord 282.

Johnston and *M'Dowell*, contra, cited *Scott vs. Baldrick*, 2 Const. R. 410.

CURIA, *per Colcock, J.* It is obvious the opinion of the presiding judge is founded on a mistaken view of the decisions of the constitutional court in relation to contracts made with overseers. It is supposed that these contracts have been considered as entire contracts not susceptible of division, and it must be acknowledged that some of the cases have, to say the least, a strong inclination to that doctrine. But the case of *Byrd vs. Boyd*, decided here at our last sitting, has removed all doubt on that subject. Although the employer may have good cause to turn off his overseer, yet if he has faithfully discharged his duty up to the time that the cause of dismissal arises he can claim his wages for the time he has served. So that the verdict in this case cannot be set aside. Had the verdict been given for the whole amount demanded, then it would have been incumbent on this court to have granted a new trial.

New trial refused.

M'CLUNEY VS. LOCKHART.

The doctrine that where a parent suffers property to go and remain in the possession of a married child, a parol gift is presumed, applies as well, where the property goes into the possession of the child at marriage as afterwards.

It is always a question of fact to be determined under all the circumstances, whether a gift was intended or not.

The presumption is strongest where the property goes into the possession of the child at marriage.

This was an action of trover for a slave. The plaintiff proved that about a year after he had married the defendant's daughter, the defendant permitted the negro in question to come, or sent her to his house, where the slave remained until the death of his daughter, when the defendant claimed the negro. There was contradictory evidence, as to the fact whether the slave had been given or only loaned.

HUGHES, J. who tried the cause charged the jury that the rule of law that where a parent suffered property to go with a child upon marriage, a gift was implied, did not apply in this case. That here the property went into the possession of the son in law, a year *after* marriage. That in such cases the rule did not apply.

The jury found for the defendant and the plaintiff appealed.

Williams, for the appeal.

Clendenen, contra.

CURIA, *per* COLCOCK, J. We are constrained to grant a new trial, for the position as stated by the court is not the law, and it may have influenced the jury in making up their verdict. The long and well established doctrine is that the presumption of a gift may arise from the circumstance of a parents sending a slave to a married child and suffering it to remain in the possession of such child without any express stipulation on the subject, and that whether the property be sent immediately on the mar-

riage or some time after. The time at which it was sent may strengthen or weaken the presumption. If sent home with the child immediately on the marriage it is almost conclusive. If a long while after, still the presumption may arise, although it is not so conclusive. If a long while after, still the presumption may arise, although it is not so conclusive. And this is manifest when we advert to the reason on which the doctrine is supported. There is a moral obligation on parents to provide for and support and assist their children according to their means; and for the honor of human nature most parents are equally pleased with their children when they are able to do so. This obligation does not cease when a child leaves its parent, unless such provision as is consistent with his situation in life is then made. It may not be in the power of a parent at the particular time of his child's marriage to assist him, but he may afterwards acquire the means of doing so. Some are disposed to withhold their assistance at first with a view to excite the child to proper exertions. These and thousand other reasons may retard the discharge of this moral duty, but it is a duty which can only end with life, and which a parent may be as much disposed to discharge at one period as another. In the case of *Hatton vs. Banks* the negroes were not sent when the young people first went home.

If this case had been submitted to the jury to determine whether under all circumstances it was not a gift we should not have sent it back.

New trial granted.

SIMS VS. DE GRAFFENBEID.

In this case it was held that it was not sufficient evidence of the execution of a deed of conveyance, to prove the hand writing of one of the subscribing witnesses, who was dead, the witness knowing nothing of the grantor, or the other subscribing witness. The signature of the grantor and of the other subscribing witness, if he were dead or out of the state, should have been proved.

A deed cannot be admitted as an ancient deed, unless it has been accompanied by possession. 2 Nott and M' Cord, 55, 400.

A person having a title to lands, never having been in possession, may convey them without first making an entry. The common law on that subject, and the statute of Henry was not of force in this state, though the statute is enumerated among the British statutes of force. From the earliest times in this state where one has a good title to lands, he might convey them to a stranger, or commence an action against any one in possession, without entry by himself, or any previous possession by his ancestor, or even having received rent.

HINCHIE VS. FOSTER.

In this case the court decided, that to save costs, it is too late to tender money after a writ has been taken out, and signed and sealed by the clerk, although it has not yet been lodged with the sheriff. The plaintiff has already incurred the costs, and if the defendant admits the debt, he must pay the costs accrued. But the defendant having paid the money into court, which was taken out by the plaintiff, except so much as would pay the costs, it was held that the plaintiff's accepting the money discharged the defendant from payment of costs.

Where a defendant gets the leave of court, after action brought to pay money into court, it is always upon condition that he pays the costs then due.

STONE vs. JONES.

It was decided in this case, that a defendant who has pleaded usury to a demand against him, cannot take out a commission to have himself examined, as a witness, under the act, on his going out of the state. He must appear in court and give evidence.

THE STATE vs. BOWEN.

With the consent of the prisoner, the state may examine witnesses by commission.

Quere? If in any case the court will grant a new trial on the part of the state?

This was an indictment for perjury. The proof was fully made out by the evidence of four witnesses at least. Three of the witnesses had been examined by commission, by order of court made with the prisoner's consent. The testimony was not objected to on the trial, but his honor, Mr. Justice HUGER, in charging the jury said, that although he was perfectly satisfied that the defendant's guilt was fully proved; yet it was his duty as a judge to say to them, that the testimony taken by commission was illegal, and they were bound to reject it, as if they had never heard it read; and when this testimony was out of the way the defendant's guilt was not made out by two witnesses, and that he should consequently be acquitted. The jury acquitted him.

Evans, solicitor, moved for a new trial. He was aware that the court was not in the habit of granting new

trials on the part of the state, but he wished to have the opinion of the court on the point in question. He cited the *State vs. Wright*, 2 Const. R. Tread. 517. *King vs. Mawbey*, 6 T. R. 638.

Levy, contra, submitted the case to the court.

CURIA, *per* NOTT, J. The granting of new trials is in a great measure a matter of discretion with the court, or perhaps I should rather say, it was formerly an application to the discretion of the court; for I now consider a new trial a matter of right, where a person has been improperly convicted in a court of criminal jurisdiction; and in a great measure so when a verdict in a civil action is contrary to law or evidence. But it has not been usual in any case of a criminal prosecution, to grant a new trial for any cause when the party has been acquitted. In the case of the *State vs. Wright* and others, 2 Const. Rep. Tread. Ed. 517, the court were unanimously of opinion that a new trial ought not to be granted, even in a case of misdemeanor, where the defendant had been acquitted; and that case appears to have been well considered, and a great many authorities are adduced in support of the opinion. I will not say that a case may not be so circumstanced as to authorise the court to grant a new trial where the defendant has been acquitted, but I do not think that the right to do so is established by the case of the *King vs. Mawbey*, 6 D. & E. 619, which was relied on for that purpose. And in any event I should not feel disposed to make a precedent in this case; for although I think the testimony was improperly rejected, yet I do not know that the defendant would have been convicted if it had been received. The jury may not have believed the witnesses, or might not have given that weight to the testimony, which the presiding Judge seems to think it was entitled to. But it is not important in this case, as the object of the motion is, more to get the opinion of the

Court with regard to the admissability of the testimony; than for a new trial ; and on that question I feel no difficulty. In Chitty's Criminal Law, it is said, "When a witness resides abroad, or is about to leave the country before trial, he may, by the consent of both parties, be examined on interrogatories. But this cannot be done if the defendant refuses, because the evidence is not the best which the case admits." And "when a party in a case where consent is necessary, refuses to grant it, the Court will put off the trial, to give time for the attendance of the witnesses." 1 Chitty 612. And in the case of *Mostyn vs. Fabrigas*, Lord Mansfield mentions the case of a woman who being indicted, alledged that her witnesses resided in Scotland, and that she could not compel them to come up to give evidence. The court compelled the prosecutor to consent that all the witnesses might be examined ; and declared that they would have put off the trial of the indictment from time to time forever, unless the prosecutor had so consented. Cowper 174. In this case the testimony was taken by consent. No objection was made by the party on the trial. I am of opinion therefore, that it ought to have been received, but I am nevertheless of opinion that the motion for a new trial ought not to be granted.

New trial refused.

STATE VS. BRITTON.

This was a case of bigamy, and it was held that the declarations of the prisoner, that he had married the first wife, and proof of cohabitation for fourteen years, was sufficient evidence of the first marriage.

DOUGLASS vs. HART.

Where the plaintiff a merchant, was absent from the state, at the trial of the cause, held that proof of the original entries being in his hand writing, was incompetent evidence.

The only cases where the entries have been proved by others than those who made them, have been in cases, tried on writs of enquiry. It is never permitted where the defendant appears and defends the case.

The cases of Foster vs. Sinkler, 1 Bay 38, and Spence vs. Saunders, 1 Bay, 115, were cases tried on writs of enquiry.

This was a summary process on open account. The plaintiff, a merchant, was absent from the state. HUGER, J. who tried the case admitted proof of the original entries being in the hand writing of the plaintiff.

Hill, for the defendant, appealed.

Williams contra, cited 2 M'C. 349. 3 M'C. 295.

In reporting the case to the court of appeals, his honor stated that he thought he had been wrong.

CURIA, *per* JOHNSON, J. The court concur with the presiding judge in his correction of the opinion expressed by him on the circuit. In the case of Foster vs. Simpson, 1 Bay 38, the court permitted one partner to prove entries made by another, who was out of the state, in a merchants account; and in the case of Spence against Saunders, 1 Bay 115, proof of the hand writing of the plaintiff, who was out of the state, was admitted in evidence, in an action brought on a physicians bill, who had sworn to the correctness of his books before he left the state. But both of these were cases tried on writs of enquiry, and the opinion of the court, particularly in the latter case, proceeds on the ground that the defendant by his default admitted every thing necessary to the plaintiff's right of recovery, except the amount, and that in such cases strict proof was not necessary. So far these cases must be regarded as binding authority. I think, however, that it would be unsafe to extend the authority beyond the precise cases. A party who comes in and de-

fends the demands made upon him is entitled to demand strict proof of his liability. To permit a plaintiff to raise an account which he himself would be competent to prove and to evade the penalties of perjury by putting himself out of the way and substituting proof of his hand writing, would be to expose the community to a speculation which would be ruinous in the extreme and against which no caution or vigilance could possibly protect it.

The case of Walker and Bragg vs. Parham, 3 M'Cord 295, turned upon the fact, whether Walker, whose hand writing was offered to be proved, was out of the state, and does not decide this question.

The analogy attempted to be drawn from the case of Elms vs. Cheves, 2 M'Cord 349, where proof of the hand writing of a clerk, who was disinterested and who had left the state was admitted, cannot be sustained. The admission of that evidence proceeds on the principle of necessity. The plaintiff could not command his attendance, nor could the court enforce it by process. Proof of the hand writing was therefore the best evidence which the nature of the case admitted of. But not so where the hand writing of the plaintiff himself is to be proved. In legal contemplation he is always in court; at all events he might be there, and supercede the necessity of secondary evidence. Proof of the hand writing of the plaintiff in the present case was therefore improperly admitted and the motion must be granted.

New trial granted.

POOLE VS. GIST & RODDY.

An attorney is not bound, but is authorized, to receive money collected on an execution for his client.

Where a demand was placed in the hands of A. and B. attorneys in copartnership to collect, and before the money is collected on the execution the attorneys dissolve their copartnership, and afterwards one of them receives the money from the sheriff and gives a receipt in his own name, and neglects to pay the money over to the plaintiff, both of the attorneys are liable as copartners.

The defendants practising as attorneys under the firm of Gist and Roddy brought an action in the name of the plaintiff against Meadows, and prosecuted the same to judgment and sued out execution. After the dissolution of the copartnership between the defendants, the money was paid to Roddy, partly by the defendant Meadows and partly by Hunt the sheriff, who collected it on fi. fa. for which Roddy gave receipts in his own name and not in the name of the firm. Roddy neglected to pay over the money and this was an action brought to recover it.

The responsibility of Roddy was not denied, but the liability of the defendant Gist was opposed on the ground that the receipt of the money constituted no part of their professional duties, and that the receipt by one could not therefore bind the partners; and on the further ground that Gist was not bound by the receipt of the money by Roddy after the dissolution of the copartnership.

Farrow, for the appeal.

—, *contra*.

CURIA, per *JOHNSON*, J. It may be admitted that in general the obligation which the law imposes on an attorney in respect to his client is discharged by prosecuting his cause to an end which would seem to exclude the idea that the receipt of his clients money constituted any part of his official duty. *Com. Dig. Tit. Attorney*, B. 9. 10. And hence the objection which is now raised; and I think it a reasonable conclusion that an action would not, unless

perhaps under very peculiar circumstances, lie against an attorney for neglecting to receive money recovered for his client. The authority of the attorney to receive the money of his client if he thinks proper to do so, has so far as I have been able to ascertain, never been seriously questioned. The usage is universal, and the oldest members of the profession practise it, and it is sanctioned by very high and venerable authority. In 1 Rol. 291. L. 17. and 1 Do. 367, cited in Com. Dig. Tit. Atty. B. (10,) it is said, that an attorney may, on the receipt of the money of his client, acknowledge satisfaction on the record.

The ground most relied on and which has been urged with great zeal arises out of the receipt of the money by Roddy, after the dissolution of copartnership. It is founded on the well understood rule, that after the dissolution of copartnership one of the partners can do no act which will charge the firm. But the rule has been used on this occasion without regard to the exceptions and qualifications which necessarily arises out of the connection of partners. Accidental and inevitable circumstances, or the mere will of the parties may put an end to the copartnership in a sudden and unexpected manner, and although as between them the copartnership may be dissolved, the power of discharging the obligations that they have incurred in that relation and of settling all their concerns must of necessity remain, and for these purposes as to all the world they must continue to be partners. Gow. on Partnership, 286-7. 311. Let us by way of illustration take the case of partners engaged in business as common carriers who undertake the transportation of goods and after the receipt of the goods and before they are transported they think proper to dissolve the copartnership, and one of them embezzles the goods, here the goods deposited with them was on their joint credit and

on the faith of their joint undertaking, and surely in an action against them it would be no excuse on the part of the unoffending partner that the concern was dissolved. So in this case the plaintiff confiding in the joint skill and integrity of the defendants as attorneys employed them to conduct his suit against Meadows; in virtue of the contract between them they derived an authority to receive his money, and having received it, they are bound to account for it. As between themselves, the partnership was dissolved, but with respect to their engagement with the plaintiff they could not dissolve it. The authority to receive was derived from a joint contract and their liability must be joint. The opinion of Chancellor Thompson delivered in the case of Hall et. al. vs. Ex'rs Foster, and concurred in by this court in January last, is conclusive as to this branch of the case. Some stress has been laid on the circumstance that Roddy used his own name only in giving the receipts and not the name of the firm, but there is nothing in it, for it is very clear that if one partner do an act connected with the object of the copartnership, all are bound by it, although it be done in his individual name. *Gow. 73. 78.*

New trial refused.

PRICE, Ordinary, vs. GREGORY.

Where a third person brings suit on an administration bond in the name of the ordinary, endorsing his name on the record, and acknowledging himself liable for costs, the Ordinary is a competent witness to prove the bond.

This was an action of debt on an administration bond. The suit was brought for the benefit of a party who was injured by the defalcation of the administrator, under the act of 1789, and his name was entered on the record as the real plaintiff and acknowledging himself liable for costs.

TRESCOTT & INGLESBY VS. M'LAUGHLIN.

To obtain the sale of mortgaged property by suggestion in a court of law, the plaintiff must first obtain his judgment, but he is not obliged to file his suggestion and move for a sale of the property within six months after rendition of the judgment.

The defendant must have notice of the suggestion, which may be given to him before the sitting of the court at which judgment is obtained, and then the plaintiff may obtain an order for sale at the same court that he obtains judgment on the bond.

But the plaintiff may serve notice of his suggestion and obtain an order for sale at any other sitting of the court, after the judgment on the bond.

Where the order of sale is immediately made at the time the judgment is obtained, the sale must take place within six months, but when made at any subsequent period, at any time within six months of the order.

The plaintiffs obtained a judgment against the defendant on a bond, at the March term, of Sumter court, 1826, and having a mortgage to secure the payment of the bond, filed their suggestion on the 20th February, 1827, returnable to March term succeeding, to procure a sale of the mortgaged premises, in pursuance of the act of Assembly. HUGER, J. who presided at the March court, refused to grant an order for the sale of the premises, because the suggestion was filed more than six months after the rendition of the judgment on the bond.

Haynesworth, for the plaintiff, appealed.

CURIA, *per* COLCOCK, J. It is the duty of the court to give such a construction to the acts of the legislature as will carry into effect their obvious intention. The construction which has been given to this act by the presiding judge accords with its letter, but it is in direct opposition to its spirit, and must entirely defeat its operation; for it is not in one case in an hundred that the order for sale can be obtained at the same court at which the judgment is obtained; and it may very often happen that the intermediate judgment, which gives jurisdiction to the court, is obtained at the same court with the judgment on the debt secured by the mortgage. Now when the

act gave the power to the court of common pleas to foreclose a mortgage, it cannot be questioned but that it was intended to give some notice of the proceedings by which it was to be foreclosed to the mortgagor. The legislature never meant any thing so absurd and oppressive, as that a man should be deprived of his rights without some notice, or some opportunity of being heard. The court therefore made the 43d rule to meet this view of the subject, which directs that "in suits on bonds or other papers secured by mortgage of real estate, the plaintiff shall obtain judgment as in other cases, and if he wishes to have a special order for the sale of the property mortgaged, he shall at any time pending the suit, *or after judgment*, file a suggestion, stating the time when the parties by and to whom, and the conditions upon which the same was made, and the description, buttings, and boundings of the land, and such other particulars as may be necessary to bring all the circumstances before the court; and when this is done he shall serve on the defendant or the attorney a ten day rule to shew cause why such mortgaged estate should not be ordered to be sold, and upon the return of that rule he may move the court for such order."

The law is certainly very inartificially drawn, and I will not say that the rule is the best which could be made to carry the law into effect, but they may receive such a construction as will meet every case contemplated by the act and afford that remedy which is indispensably necessary in most cases.

In the first place the law gives the power to the court to order the sale of the mortgaged property for the satisfaction of the monies secured by the mortgagee. Now this is a complete and substantial grant of power. What follows is matter of discretion, and to give a reasonable extension of the time when the sale is to take

place, not exceeding the term of six months from the judgment. That is, when the order is immediately made at the time of obtaining the judgment, the sale shall take place within six months, and when made at any subsequent period, at any time within six months.

The object of the law was to save expense and to furnish a more expeditious mode of foreclosing mortgages than that practised in the court of equity; for in cases where the amount was not great such is the expense attending that court and the delays incident to that mode of administering justice, that it would be better for the party holding a mortgage to abandon it altogether rather than attempt to foreclose it in equity. Now it will at once be perceived that where the rule is not served on the defendant before the court sits, and before the judgment is obtained, the order for sale can never be obtained at the same court at which the judgment is entered up. Again to give the act the construction which it has received on the circuit, would be to compel every creditor immediately to proceed to sell his debtors property; and it cannot be imagined that such was the intention of the legislature. The creditor when he wishes to foreclose his mortgage may file his suggestion at any time after the suit is commenced, and he may serve the debtor with the notice to appear at the court which he expects to get a judgment, and if he should obtain the judgment and there be no opposition the order may be made, but if he does not wish to distress or press his debtor, or if on the return of the rule, any objection should be made which could not be immediately determined, then the act could not operate. If the construction which it has received be sanctioned, thus and in many other ways would it be rendered inoperative. But we feel bound to carry the act into effect and see no such ambiguity in its language or provisions as to prevent us from doing so.

It is therefore ordered that the land be sold at any sale day before the first Monday in January next, if the defendant shall not within that time pay to the plaintiff the full amount of principal, interest and costs due by him at that time, and that the same be sold on a credit of twelve months. The titles to be signed but not delivered until the money be paid, according to the terms of sale, and if the amount of the purchase money be not paid when due, the sheriff shall re-sell by virtue of the same levy, on account of the former purchaser, for cash. Terms to be declared at the sale.

Sale ordered.

RELPH, & Co. vs. GIST, adm'r. of Coleman.

It is not necessary that a seal should be made of wax.

The impression and not the wax makes the seal.

Whether the impression was intended for a seal is always a question of fact for the jury, whether made of wax, ink, or otherwise.

If the body of the instrument does not shew the intention to make a scrawl a seal, it may be shewn from the scrawl itself, or by evidence aliunde.

As where the L. S. are enclosed with the scrawl, proof that the letters are in the hand writing of the obligor.

Or where a person uses a symbol or cypher, that it has usually been employed for the purpose of a seal and no other.

Parol evidence is admissible to prove that the party intended the scrawl for his seal.

Although a debt from the intestate to the administrator may not yet have fallen due, he may notwithstanding retain funds for the payment of it, in preference to debts of an inferior grade.

The plaintiffs sued on a book account, and the defendant pleaded a retainer of a debt to himself by a note of his intestate to a larger amount, to the signature of which was annexed a cypher of [L. S.] It was not expressed to be under seal, and there was no attesting witness, but it was proved by a person who was intimate with the intes-

tate that he had a peculiar mode of making a cypher to designate a seal, and that the cypher to this note had so much of this peculiar character that he believed it was made by the intestate. . The right of the defendant to retain for this note as a specialty was objected to because it was not yet due; and the counsel for the plaintiff contended that the 26th clause of the executors act provides only for debts *due* by an intestate, and therefore excluded this note which was not yet payable.

WATIES, J. considered this an unreasonable construction of the act, as it would give to an open account, which the act postponed as the last, a higher rank in the order of debts than a specialty, and in its operation would allow an open account on a deficiency of assets to exhaust the whole to the exclusion of a specialty, only because the specialty had not arrived at the time of payment. But it appeared to him that the legislature in using the words "debts due" had a regard only to their legal obligation and not to the period of their payment. He submitted to the jury whether the instrument was under seal or not.

The jury found a verdict for the defendant.

The plaintiff moved for a new trial on the ground that the plea of retainer ought not to have been sustained as the note was not a specialty, and if that were even the case that the debt was not due and therefore could not be retained.

A. W. Thomson, for the appellant.

Herndon, contra.

CURIA, *per* NOTT, J. The first question in this case is whether the scrawl of a pen made with the intention of representing a seal is sufficient to constitute a specialty! It might be sufficient in answer to this question to observe that such has been the usage of the state ever since the revolution and probably long before. And during that long period such instruments have been regarded as spe-

cialties and recognized as such by all the tribunals of this state. The case principally relied on by the plaintiff in opposition to this principle is that of *Warren vs. Lynch*, 5 Johnson's Rep. 239, where Judge Kent with his usual learning and research has endeavored to show that nothing but wax will constitute a seal in England, and from whence he has drawn the conclusion that wax or some other tenacious substance capable of receiving and retaining an impression is necessary for the same purpose in New York. But it is not necessary for the purpose of deciding the question now before us to enquire into the truth of the fact which that learned judge has attempted to establish, nor the correctness of the conclusion to which he has arrived. For even though it should be admitted that a scrawl has never been introduced into England or New York as a substitute for a seal and therefore can not now be regarded as such, it does not follow that it may not be so received in this state, where the practice has so long prevailed. It is admitted in New-York that such is the practice in Pennsylvania and Virginia. *Meredith vs. Hensdale*, 2 Cains 362. *Warren vs. Lynch*, 5 Johnson 244. In the case of the *United States vs. Coffin*, Bee's Admiralty Reports 140, C. J. Elsworth held the letters L. S. enclosed in the circumflex of a pen was sufficient to a custom house bond, when acknowledged by the party as his seal, to make it a specialty. And I have very little doubt that such is the law of every state in the union, ex-New York. Nor do I think, when the subject comes to be investigated, that it is doing any such violence to the principles of the common law as it seems to be supposed. The whole discussion seems to have arisen from what appears to me a misconstruction of Lord Coke's definition of the word *Sigillum*. *Sigillum est cera impressa, quia cera, sine impressione, non est sigillum*. From hence it is concluded that Lord Coke meant to be understood that

wax would constitute a seal. But the expression of Lord Coke is; *cera, sine impressione, non est sigillum*. So that it is the *impression* at least which constitutes the seal and not the wax. The wax is not added as a necessary ingredient of the deed, but merely as a substance on which the impression may more easily be made. And Judge Kent admits that in New-York a wafer, paste, or any other tenacious substance capable of receiving an impression, may be received as a substitute. And if it is the impression which constitutes the seal, I can see no good reason why it may not as well be made on the paper itself as on any substance annexed, and be as well made with a pen as with any instrument. It does not appear to me to be such a departure as to afford any just cause of alarm. In Shepard's Touchstone, it is said, if a party seal a deed with any seal besides his own or with a stick or any such like thing which doth make a print, it is good. Shep. 56-7. In Reeve's History of the English law it is also said, that although the word *sigillum* often occurs in the old charters, yet some great antiquarians, among whom is Sir Henry Spelman, have agreed that this did not mean a seal of wax, but was used synonymously for *signum* and denoted the sign of the cross and other symbols made use of in those times. 1 Reeve 11. And although the common and civil law writers do speak of seals as necessary to the ratification of certain instruments, they say nothing of the material of which they were composed. Wax is indeed sometimes alluded to as being in use, but I do not know that it is any where held necessary. It is certain that the most ancient deeds and charters in England were solemnized by the sign of the cross or by the hand writing of the party, to which the cross was annexed, without any other semblance of a seal. And it was not until long after the Norman conquest that seals were introduced into common use in England. 1 Reeve 11. 2 Blk. Com. 306.

In *Terms de La Ley*, tit. Deed, 150, it is said that Ingulphus, the Abbot of Croiland, complained of the introduction of waxen seals by the Normans instead of crosses of gold, and other holy signs, as an innovation on the laws of England. And Richard Lacie, chief justice of England, in the time of Henry II. held that a mean man had no right to use a private seal; that it was a privilege which pertained to the king and nobility only; and I think it would be difficult to establish that a cross might not be used instead of a seal even in England at this day. That however is not material to the present question. The same usage which established the waxen seal in England sanctions the scrawl in this state and gives it all the solemnity of a seal.

The next question is whether the scrawl itself carries with it sufficient evidence of the intention, without any evidence aliunde. And on that question I have as little difficulty. When a person makes use of a well known symbol or cypher which has usually been employed for the purpose of a seal and no other, the court will presume that it was annexed for that purpose; and this opinion is not, as seems to be supposed, at all at variance with the decision heretofore made in the case of *Strange vs. Gaston*. The question there was not whether the party by adding the scrawl intended it as a seal, but whether the scrawl had actually been annexed by him at the time the note was executed, and the court decided that the mere circumstance of a scrawl appearing upon the paper, without any declaration of the party that a seal had been affixed, nor any other evidence of the fact, was not sufficient to constitute a deed. And if it had been a piece of wax the decision might have been the same. If a person were to introduce as a seal some hitherto unknown and unusual symbol or hieroglyphic, perhaps some additional evidence of his intention would be required.

The next question is whether the annexation of the scrawl, and the intention, may be proved by parol evidence, or whether it must appear on the face of the instrument, by the acknowledgement of the party that he had affixed a seal? It is very well settled that it is the seal and not the allegation of the party to the instrument, that constitutes the deed. It is said in Comyn that it need not be mentioned in the deed, *sigillum apposui*, 4 Com. D. 157; and if a corporation seals there is no need to say *sigillum nostrum commune*. See, also, 5 Bacon 159, tit. Obligation C. I think, nevertheless, that the safest method always is to observe the usual formality, "signed, sealed and delivered," for then the more doubtful testimony aliunde need not be resorted to.

The only remaining question on this branch of the case is whether there was sufficient evidence in this instance of the annexation of the scrawl. The witness who appears to have had a familiar acquaintance with the hand writing of the intestate said he had a peculiar method of making a scrawl which he intended as a seal, and he thought from that circumstance that this was made by him and that the initials L. S. which were also added were by the same hand; and I think that was sufficient evidence to go to the jury.

Another ground of the motion is that the defendant had no right to retain, as the debt was not due at the time. On that question I concur with the presiding judge, and have nothing to add to the reasons which he has given for his decision. The motion is therefore refused.

New trial refused.

THE TREASURERS VS. ROSS, Ex'or of Allison.

Neither the state, nor any one authorized by the state, can maintain an action against a clerk of the court of common pleas, on his bond, for neglecting to record judgments recovered in his office.

None but persons injured by the neglect can maintain the suit.

Where the successor to a clerk records the judgments so neglected he cannot recover against his predecessor the fees for recording them.

Allison the defendant's testator, had been clerk of the court of common pleas for York district, and during the term of his office, he had neglected to record many of the judgments obtained at that court. Moore was elected his successor, and was authorized by a resolution of the legislature to commence a suit in the name of the treasurers of the state on Allison's bond, given for the faithful performance of his office, to recover the amount of fees due for recording the judgments by Moore, which Allison had neglected, provided it should be at his own expense and responsibility. This was an action of debt on the bond, and the breach assigned, was the neglect of Allison to record the judgments.

The defendant moved for a nonsuit on the ground that no breach existed when the suit was brought, as the plaintiff, by his own shewing had before that time recorded the judgments.

WATIES, J. who tried the cause, was of opinion that this was a good objection. The plaintiff could derive no other right from the resolution than that which the state possessed; and as the state could not now maintain the suit on the bond for a breach which had been repaired, the plaintiff could not. It appeared to him if the plaintiff had any remedy it was by an action of assumpsit for services rendered. He therefore ordered a nonsuit.

This was a motion to set aside the nonsuit.

Mills, for the motion.

Ross, contra.

CURIA, *per* Nott, J. I concur in opinion with the presiding judge that the breach assigned in this case was not such as authorized the plaintiff to maintain this action. The act of 1789, requires the clerk of the court to give bond with good security for the just and faithful discharge of his duty, and it declares that such clerk with his sureties shall be liable to all damage sustained by any person or persons in consequence of the malpractice committed by such clerk. P. L. 488. It appears therefore that the object of the bond is to indemnify all such persons as may sustain any damage by the malpractice of the clerk and not as an indemnity to the state. The breach assigned is neglecting to record certain judgments in which individuals alone were concerned. The omission to do which only operates, to their injury and in which the state had no interest. The defendant's testator might be twice liable for the same thing, if he should be held answerable to the present plaintiff; for a recovery in this case would be no bar to an action by any individual who had been injured by the negligence complained of. This resolution of the legislature gave to the plaintiff no right, except such as the state possessed. And if the state had no right, the action must fail. But there are other objections to the plaintiff's recovery in this case. His services were not only gratuitous and therefore could not be the foundation of an action, but the defendant's testator derived no benefit from them. In any point of view therefore in which the case now can be considered this motion cannot prevail.

Motion refused.

BOULWAR VS. PICKETT.

Costs are not allowed on appeals from the ordinary.

Muse Boulwar's will was propounded before the ordinary of Fairfield, which was opposed on the ground of insanity. The ordinary decided in favor of the will, and an appeal was taken up to the court of common pleas, where the jury also found in favour of the will. The ordinary afterwards, on motion of the appellees, taxed the costs of the issue, against the appellants, who appealed to the circuit court and then the taxation was set aside, on the ground that no costs could be taxed on issues of *deviavit vel non*, on appeals from the ordinary. The point was now made before this court.

Clarke, for the motion.

Pearson, contra.

CURIA, *per* NOTT, J. In the case of Denton and English, 2 Nott and M'Cord 376, it was decided that the prevailing party was not entitled to costs, on an issue from the court of ordinary. It is said in that case that if costs can be allowed any where it must be by the ordinary, as the case originated in his court. It is thought to be analogous to an issue out of chancery where it is said that the costs are discretionary. But the only discretion which the chancellor has is to determine in what manner the costs shall be paid. He cannot allow costs where costs are not allowed by law. The law does not allow the party costs in this case, and the motion must therefore be refused. The court say nothing about the ordinary's own costs. He is entitled to receive whatever the law allows.

Motion refused.

SMITH vs. SMITH.

A person cannot set up a title under a grantee who was dead at the time the grant was taken out, as there was no one in esse in whom it could vest.

This was an action of trespass to try titles to a tract of land. The plaintiff claimed under a grant issued in 1775 to Agnes Harbison. The defence was that the pretended grantee died in 1773, previously to the issuing of the grant and therefore the land never vested in her. To that it was replied that the defendant could not have the benefit of such a defence, because a court of law could not enquire into the validity of a grant.

The jury found a verdict for the plaintiff. The defendant moved for a new trial.

Clarke, for the motion.

Williams, contra.

CURIA, *per* NORR, J. The validity of the grant is not brought into question in this case. The whole enquiry relates to the grantee. There can be no doubt but that the title vested in Agnes Harbison if she was alive in the year 1775, and that the plaintiff was entitled to recover. So that the whole case is resolved into that single question. It is manifest that Agnes Harbison under whom the plaintiff claims died two years before this grant was issued. It could not take effect, therefore, because there was no person in esse in whom it could vest. The land still continued vacant, and might be taken up by the defendant or any other person. The verdict is therefore clearly contrary to the evidence, and a new trial must be granted.

COLCOCK, J. I have a doubt whether we can look beyond the grant.

New trial granted.

The Ex'rs. of SOLOMON HILL vs. ANDREW HILL.

Though the court of law has not the power to enforce an election, it may determine from the facts of the case whether the party has elected, and settle the rights of the parties accordingly.

Col. Hill the father of the plaintiff's testator, Solomon Hill, and of Andrew Hill, by his will gave a tract of land to Andrew on condition that he would relinquish all right to certain negroes then in the possession of Colonel Hill, which negroes were bequeathed by Col. Hill to Solomon. The defendant claimed under a bill of sale from one Arnold. Col. Hill had been in possession of the negroes many years, and much evidence as to the right of property on both sides was given, but the reporter publishes only as much as is necessary to a proper understanding of the points of law decided by the court. The case was tried before HUGER, J. and a verdict was found for the defendant. The plaintiff appealed.

Clendenin, for the appeal.

Rogers, contra.

CURIA, *per* NOTT, J. The facts of this case are involved in a great deal of obscurity, as is often the case in family transactions of this sort. With regard to the right of Arnold under whom the defendant claim it is now too late to suffer such a question to be raised. Nor could such an enquiry, whatever might be the result, affect the rights of these parties after such a lapse of time. How Colonel Hill acquired a right to dispose of these negroes by will, does not appear, unless it was by possession from the year 1810, when Andrew Hill left him to the year 1816 when he died. It appears however that Colonel Hill himself entertained doubts of his right by his annexing as a condition to the devise of the land to Andrew that he should relinquish his right to the negroes. The devise itself did not divest Andrew of his right. But he

can not take both under the will. The acceptance of one would amount to a relinquishment of the other. For although the doctrine of election belongs peculiarly to the court of equity, the power of *enforcing* which cannot well be exercised by a court of law, yet the court can make the enquiry whether an election has been made or not and determine according to the result of such investigation. Thus, for instance, if the plaintiff had produced an unequivocal relinquishment in writing from Andrew Hill to himself of the negroes in question according to the provisions of Col. Hill's will there can be no doubt that he would have been entitled to recover. The principle being admitted, such relinquishment might be proved by other evidence or inferred from circumstances. I think therefore the question ought to have been distinctly submitted to the jury whether he had not made his election and renounced his right, if he had any, to the negroes in question. His honor then went into the facts of the case.

New trial granted.

CAMERON vs. the ad'mr. of WURTZ.

In marshalling the assets of an insolvent estate, a judgment recovered in another state only ranks as a simple contract.

This suit was brought against the defendant as administrator of Wurtz. The plaintiff contended that he had paid the debts out of order. The question was whether a judgment recovered in North Carolina was to rank as a judgment debt, in marshalling the assets of an insolvent estate in South Carolina, or whether it only ranked as a simple contract debt. The case came up on demurrer before RICHARDSON, J. who overruled the demurrer and held that the debt only ranked as a simple contract.

The plaintiff appealed and moved to set aside the judgment.

Coit, for the motion.

Robbins, contra.

CURIA, *per* NOTT, J. The only question in this case is whether a judgment of a sister state is to rank as a judgment of this state in marshalling the assets of an insolvent estate or as a simple contract. It is admitted that the judgment of a foreign country, other than one of the United States, is considered in the nature of a simple contract. And it must be admitted, I presume, that the states are independent sovereignties, except so far as they have surrendered their sovereignty by the federal constitution. In all other respects they must still stand in relation to each other as foreign states. It is to that instrument, therefore, that we are to look for the solution of the question now submitted to us. The 1st section of the 4th article declares that "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner, in which such acts, records, and proceedings shall be proved and the *effect thereof*." That clause of the constitution does not appear to me to have effected any change in the nature of the judgment. It only provides that *as matter of evidence* it shall be entitled to *full faith and credit*. Suppose the government of the United States should by treaty enter into a similar compact with Great Britain or France. It would give to the judgment no further operation than as a piece of evidence. Or suppose the constitution had declared that an affidavit taken before a person competent to administer an oath in any state should be entitled to full faith and credit in any other state, such affidavit would be considered merely as parol evidence

and not entitled to the dignity of a judgment or a public record.

The case of *Mills vs. Durgee*, 7 Cranch 481, which has been relied on does not militate against this opinion. In that case it was decided that a person could not plead *nil debit* to an action on the judgment of a sister state. Because such judgment is entitled to full faith and credit. It can therefore be avoided only by denying the record, which must be by the plea of *nul tiel record*. The case of *Hampton vs. M'Connel*, 3 Wheaton 234, does nothing more than recognize the correctness of the former decision. The constitution says Congress may prescribe the manner in which such acts, records and judicial proceedings shall be proved and the *effect thereof*. It may be contended that under these last words Congress may give to the judgment of another state the effect now contended for. But no such provision has yet been made by any act of Congress. The question, therefore, must depend upon the construction to be given to the constitution itself. And in that I concur with the judge below, and the motion must therefore be refused.

Judgment sustained.

JONES VS. BLAIR, Sheriff.

Although the Sheriff may, in an action on the case against him for an escape, prove the insolvency of the defendant to reduce the damages, yet he must also shew some other circumstance in excuse or mitigation, or the Jury must give damages to the amount of the whole debt.

But in an action on the case against the Sheriff for taking insolvent sureties to a prison bounds bond, where the defendant was committed under a Ca. Sa. the solvency of the defendant cannot be enquired into, as the only measure of damages is the amount due on the execution, under which the defendant took the bounds.

This was an action on the case against the Sheriff for not taking solvent sureties on a prison bounds bond, given by one Crowder who was in confinement under a Ca. Sa. issued in a suit of the Plaintiffs against Crowder. Proof was offered of the insolvency of the sureties as well as of Crowder, at the time he gave the bond.—**WAITES, J.** who tried the cause, charged the Jury, that though the Sheriff was answerable for the solvency of the sureties, yet if the principal, Crowder, was himself insolvent, that the Plaintiff had sustained no damage, and they might find for the Sheriff. Verdict for the defendant. The Plaintiff appealed.

Miller, for the appeal.

Williams, contra.

CURIA, per NOTT, J. It has been decided in the cases of *Brown, vs. Belcher*, and *Boyce, vs. Barksdale*, (*a*) that in an action on the case against the Sheriff for an escape the Jury were not bound to give a verdict for the whole amount of the debt due to the Plaintiff, but might give such damages as they supposed the Plaintiff may have sustained by reason of the escape. But even in such cases unless the Sheriff can shew some circumstance in excuse or mitigation, I think the Jury ought to give the

(*a*) Vide ante, 141.

whole debt, and not to speculate upon the probable chance which the Plaintiff had of recovering the whole, if the escape had not taken place. But in this case the Plaintiff stands upon still higher ground. A person who is taken on a Ca. Sa. is required to give satisfactory security to the Sheriff, that he will within forty days render to the Clerk of the Court a schedule on oath of his whole estate, or so much thereof as will pay and satisfy the sum due on the execution by force of which he is confined, and the Sheriff is made responsible for the solvency of such security. If, therefore, the Sheriff takes good security, as he is required to do, the Plaintiff will recover the whole debt; because in an action on the Bond, the amount due on the execution is the measure by which the damages are to be estimated for the non performance of the condition. *Smyth vs Wigfall*, 2, Nott and M'Cord, 135. And if the Sheriff is responsible for the solvency of the surety, he must be liable to the same extent.—Whether the person was insolvent or not, was a question which could not enter into the consideration of the case. To hold the insolvency of the party to be a justification for the Sheriff, would amount to a license to take mere nominal security in all cases of this sort. I am of opinion that the presiding Judge erred in his instructions to the Jury, and that a new trial must therefore be granted.

New Trial granted.

HALL vs. MOORMAN.

The Court will not lend a ready ear to an objection against the validity of a party's own acts, on account of incapacity brought on by drinking.

A judgment confessed on an insimul computassent is good, though the debt due was on specialties.

The Defendant being indebted to the Plaintiff, and being also indebted to others, to a large amount, for which judgments were about to be obtained, consented to confess judgment to the Plaintiff for a portion of the debt due to him. The agent of the Plaintiff not being in possession of the evidences of the debt, stated an account, which was acknowledged by Defendant to be correct and just, and a confession was taken accordingly. The confession was made at dark, on the evening of the 13th March, and the next morning application was made to the Clerk, at the distance of twenty miles, to enter up judgment, which he declined doing, having received notice not to do so. Application was then made to the Court of Common Pleas, for an order on the Clerk to enter up judgment, which was resisted on the ground that Defendant at the time of making the confession was noncompos, and that a confession could not be taken on an insimul computassent, when it appeared that the debt was on specialties.

In support of the first ground several witnesses were sworn, who stated that in their opinion the Defendant was insane when he gave the confession. Several others were sworn on the part of Plaintiff, who stated that he was neither insane nor drunk, but of sound mind, and the Plaintiff insisted that this question should go to the Jury, which his honor refused. In the declaration, and filed with it, was a stated amount of the balance for which the parties agreed the confession should be taken.

RICHARDSON, J. who heard the motion, refused the order.

At the same Court, judgments were obtained against Defendant to the full amount of his property. The Plaintiff now brought the question before this Court.

Preston, for the appeal.

———, contra.

CURIA *per* NOTT, J. The grounds on which leave to enter up the judgment in this case was refused, appear to be,

First: That the Defendant was, from intemperance, incapable of doing business at the time the confession was taken.

Secondly: That the confession was obtained by fraud.

Thirdly: That the Plaintiff's demand arose upon a bond, and the confession of judgment was on a declaration on an *insimul computassent*.

The first is a ground to which the Court will not lend a very ready ear.—If people will voluntarily incapacitate themselves from doing their ordinary business, they must take the consequences of their imprudence. They have no right to call upon this Court to protect them from all the consequences of intemperance and folly.

If, to be sure, one man takes the advantage of another when in a state of intoxication, to commit a fraud upon him, he will be entitled to relief from such fraud. But there is no direct charge of fraud in this case—and the affidavits to that point, as well as those to the intoxication, are so completely rebutted by the counter affidavits, as at least to neutralize that charge. The question then resolves itself into the simple ground of the informality of the declaration.

But the irregularity does not appear to me to be of such a nature as to vitiate the proceedings. These parties may probably have had extensive dealings. I observe among the papers accompanying the declaration, a memo-

randum of a balance for which the judgment is confessed, arising from various accounts and transactions. And although the demand of the Defendant may have been on a bond, yet there may have been various payments and accounts, which, when they come to account together, left that balance which the Defendant, promised to pay, and for which he has confessed a judgment.—2 Chit. 343; Foster vs. Allanson, 2 Term Rep. 479.

But certainly the Defendant had a right to waive the irregularity, if there was one, and he has done so by confessing judgment.

It is not pretended that the claim is unfounded, or that the Defendant has confessed a judgment for more than is actually due. But, besides, this is not the way to try the grave questions which are now submitted to the Court. It does not appear at whose instance this application is made. If at the instance of the Defendant, signing the judgment does not deprive him of his remedy—If at the instance of the creditors, they have also a more ample remedy, if there is any fraud in the transaction.

The order of the Court below is therefore reversed, and the Clerk of the Court is directed to record the judgment as of the date of the confession.

Motion granted (a)

(a) See Laws on Pleading, 450, 488.

GIVENS vs. HIGGINS, Ex'r. of Givens.

The intermeddling necessary to render a person liable as executor of his own wrong, must be such as manifests a right to exercise a controul, or make disposition of the effects of the deceased.

In some of the old cases the doctrine has been carried to an extraordinary extent.

Where a person interfered with the property merely at the request of the widow, to remove it to another place, where she had changed her residence, and did some other acts of no great importance at her request, the Court held he was not liable as executor de son tort.

Persons acting as agents for the widow, as an overseer employed by her, or a carrier to take the crop to market, or a factor to sell it, &c. not knowing in what character she was acting, would not be liable.

This was an action to recover a demand which the Plaintiff had against Robert Givens, deceased, from the defendant as Executor de son tort. The debt was proved. It was then proved that immediately after the death of Givens, the defendant employed a wagoner, and removed the effects about five miles. That he paid a debt against Givens with some of the property; That he was twice seen riding a horse which belonged to Givens, and had occasionally ploughed the horse. The defendant then proved by the widow that she was sick when her husband died, and that she had requested the defendant to move her and the property to her mother's, and that all the other acts were performed by defendant at her request. The Court held that the acts of intermeddling as proved, were not sufficient to constitute the defendant executor de son tort, and that they being done at the request of the widow, was a sufficient justification and explanation of his conduct. The Jury found a verdict for the defendant, and the plaintiff now moved for a new trial.

Hill, for the motion. The acts of intermeddling proved were sufficient to charge the defendant as executor in his own wrong, and his acting at the request and

as the agent of the widow, who had no authority, was not a justification of his conduct.

Williams, contra.

CURIA, *per* NOTT, J. There is no doubt, that any intermeddling with the estate of a deceased person, such as collecting money, paying debts with the funds of the estate, or making any other disposition of any part of the property, will make a person an executor in his own wrong. In some of the old cases the doctrine has been carried to an extravagant, and I may say, even to a ridiculous extent. A person has been held liable as executor in his own wrong, for taking a dog, and a wife for milking the cow of her deceased husband. *Genet vs. Carpenter*, 2 Dyer, 166, in note. But such a principle certainly would not be sustained at this day.

The intermeddling must be such as to manifest a right to exercise a controul or make disposition of the effects of the deceased. Acting merely as a servant will not make a person so liable, *per* BULLER, J. in *Padget*, and another *vs. Priest and Porter*, 2 D. & E. 97; Nor where one is made coadjutor or supervisor, 2 Dyer 166, *Stokes vs. Porter*. Thus for instance, if a widow should employ an overseer to superintend the plantation of her husband, a wagoner or boatman to carry the crop to market, a factor to sell it, and a clerk to collect and to pay away money under her directions, these several persons not knowing in what character she was acting, would be considered merely as her agents, and not as exercising such control over the funds of the estate as to make themselves liable. And such appears to have been the character in which this defendant acted. He acted merely as the agent of the widow. He did not pretend to have any controul over the property, and knew not probably to whom it belonged. I concur, therefore, with the presiding Judge, and am of opinion, that the motion ought to be refused.

New trial refused.

SALMON VS. JENKINS.

The plaintiff, by an instrument purporting to be articles of agreement between himself and the plaintiff, but signed and sealed by the defendant alone, obligated himself to build a house for the plaintiff by a certain day, and acknowledged payment, and on failure to build the house within the time mentioned, defendant to forfeit \$1200 to the plaintiff. Plaintiff brought his action of debt for the penalty—Held on demurrer that the plaintiff should have averred that the defendant had neither built the house nor paid the \$1200. The declaration containing no such averment, the plaintiff had no cause of action.

If a contract be in the disjunctive, the breach ought to be assigned as to both alternatives.

Until there is a breach of both alternatives, there is no cause of action.

Where the penalty professes to be a subsisting debt and the condition is added only by way of defeasance, the party may sue for the penalty, without noticing the condition; but it is otherwise where there is no subsisting debt or duty, and the obligation depends on the performance or non performance of some particular act.

If there is a contingency, it must be alleged to have happened.

This was an action of debt on an instrument under the hand and seal of the defendant Jenkins, commencing with the following words. "Articles of agreement entered into this day between Owen Jenkins, of the one part, and W W. Coleman, of the other part Know ye that said Jenkins has bargained to build for the said Salmon, a framed house," and here the instrument goes on to describe the building particularly, and the time when it was to be finished, and acknowledges the receipt of the consideration for which the house was to be built, and then adds, "Provided said Jenkins should fail to complete the contract, in the specific time, he forfeits the sum of twelve hundred dollars, to be made of his goods and chattels, to the said Salmon, his heirs, &c. given under my hand and seal," &c; "signed, sealed and delivered," by Jenkins only. The action was brought to recover the penalty of \$1200. The defendant demurred generally, and his demurrer was overruled.

Waddy Thompson, for the defendant, now brought the question up, and insisted that the action should have been covenant; or that if debt was the proper remedy, a breach of the condition was not set out in the declaration. The declaration was in the usual form of debt on bond.

Earle, contra, contended that this was a penalty, for which debt was the proper remedy.

CURIA, *per* NORT, J. In order to maintain an action of debt, it is necessary to set out in the declaration a sum certain. The plaintiff has done so in this case, and the declaration is supported by the adduction of the obligation on which the action is brought. The demurrer, therefore, cannot be sustained on that ground. But on the other ground, the general rule of pleading is, that if the contract be in the disjunctive, the breach ought to be assigned, that the defendant did not do the one act or the other; as on a promise to deliver a horse by a particular day, or pay a sum of money, 1 Chitty, 329. And in declaring on a deed, whether in debt or covenant, the rule is the same, Do. 351. Where the covenant is in the alternative, that is, where the covenantor undertakes for one of two things, breaches should be assigned as to both. 1 Espinasse, 300; or in other words, the declaration must contain every averment necessary to shew that the plaintiff has a good cause of action. Where a person undertakes to do one of two things, the performance of one is the discharge of the other. The party, therefore, who would have the benefit of the breach of one part of the contract, must aver the non-performance of the other; for until there is a breach of both, no cause of action arises. In an action upon a promise to re-deliver some rings to the plaintiff, in as good plight as they were delivered to defendant, or else pay him eighteen pounds in money, the plaintiff averred that the defendant had not re-delivered to him the rings, but omitted to say, nor paid him

the eighteen pounds in money, and this was held to be nought, though after verdict; because, said the Court, it may well be that the eighteen pounds were paid, and then the plaintiff had no cause of action. *Hardres*, 320, *Anon.* I do not perceive the distinction between that case and the one now under consideration. The defendant undertook to build a house for plaintiff, or on failure thereof, to pay him twelve hundred dollars. The breach assigned is, that he has not paid the twelve hundred dollars, without any averment that he has not performed the work. But it may be that the defendant has performed the work, and until the contrary is known, the plaintiff has no cause of action. The case in hand is to be sure an action on the case for a breach of promise, but it has already been observed, that the principle is the same, whatever may be the form of action. See also *Pordage vs. Cole*, 1 *Saunders*, 320, *Lowe vs. Peers*, 4 *Burr*, 2225, one of which is an action of covenant, and the other debt. It is said that when a person is bound in a penalty, the party to whom he is bound may sue for the penalty without noticing the condition. And that is true when the penalty professes to be a subsisting debt, and the condition is added by way of defeasance; but it is otherwise where there is no subsisting debt or duty, and the obligation depends upon the performance or non-performance of some particular act. The distinction is between a present cause of action, and one which depends upon the happening of some contingency. In the first, the plaintiff may simply declare for the money—in the other he must allege that the contingency has happened. In the present case the defendant does not acknowledge any subsisting debt. His liability is to arise, if at all, on a future contingent event, that is to say, his neglecting to build the House. The plaintiff, therefore, has shewn no cause of action, as he has not alleged the non perform-

ance of that part of the contract. It is in the nature of a condition precedent, the performance of which must always be averred. *Pordage vs. Cole*, 1 Saunders, 320, note (2) and whether it be something to be performed by the plaintiff or defendant, if it be the sine qua non of the action, the averment of performance on one side, and the non-performance on the other, are equally necessary. I am of opinion the demurrer ought to have been sustained, and the decision must therefore be reversed.

COLCOCK, J. (dissenting.) I think this was a penalty, and that it is not important whether it was in the first or last part of the deed, and therefore the suit was properly brought, and the merits might have been developed by a proper course of pleading on the part of the defendant.

Judgment reversed.

FOSTER VS. CHAPMAN.

Lands are only bound by judgments on summary process from the time they are entered on the judgment docket.

But the judgment of the Court in summary process cases, is the decree entered by the clerk on the minutes of the Court, and that is sufficient evidence, in an action of debt on such judgment.

This was an action of debt on a judgment obtained on the summary side of the Court. The Defendant pleaded nul tiel record, and the statute of limitations. Issue was joined on both pleas. The evidence of the judgment was the entry in the minutes of the Court in the following words, viz : (after stating the name of the case,) "Summary process.—Note. The Defendant in this case having made no defence, the Court gave the following decree. Let the Plaintiff take judgment for \$55, with interest from the 2nd March, 1824, and costs of suit."

WATIES, J. who tried the case, granted a nonsuit on the ground that the evidence adduced did not prove that

the pretended judgment existed, and that it was not such a record as would prevent the statute of limitation from barring the debt, after four years. His honor was under the impression that he decided in conformity with an opinion delivered by the Court of Appeals, or otherwise would have decided in favor of the Plaintiff.

Goodman, for the Plaintiff, appealed.

Henry & Earle, contra.

CURIA per NORT, J. The presiding Judge appears to have acted under an erroneous impression with regard to the decisions of this Court: It is true, that this Court has decided that lands are bound by judgments in cases of summary process only from the time they are entered on the judgment docket. That decision was made pursuant to the express and literal provisions of the act which declares that they shall bind lands from that time only; but it does not affect the judgment in any other respect. Suppose the Legislature should declare that judgments in other cases should operate as a lien on lands only, from the time of the entry of the execution in the sheriff's office, all the other attributes of the judgment would remain as before. Previous to the act alluded to, judgments in cases of summary process were not considered as having any binding efficacy on lands, and the only object of the law was to give them that effect, and to prescribe the time when the lien should commence. But this is not a new question. I have a very distinct recollection, that it was decided by the constitutional Court, I think more than twenty years ago, that the decree appearing on the records of the Court, as entered by the Judge himself, must be considered as the judgment of the Court. The opinions of the Judges were then delivered *ore tenus*. Their decisions are not reported, and are therefore preserved in the memory of those who heard them, or such memoranda as were taken by the

members of the bar, who were present. Judge Waties himself was then a member of that Court, and seems to have been well aware of the opinions of the Judges, and would have been governed by them, but for the erroneous impression which he had received of the later decisions. It is certainly consistent with the theory of all our legal proceedings in ordinary cases. All the proceedings, up to the joining of the issue, are considered as the acts of the parties, after which comes the verdict of the Jury, which assesses the amount of debt or damages, and then follows the judgment of the Court. The object of the judgment is to give consistency to the proceedings. It is a mere link intended to complete the chain, upon which the execution is to issue ; and although it professes to be the act of the Court, it is the exclusive act of the Clerk, in which the judge has no participation ; but in a summary process there is no verdict. The decree itself is the act and judgment of the Court. It is immediately entered by the Clerk, in the presence of the Judge, and there is nothing further necessary to complete the chain of proceeding. No other judgment is ever entered up in the Clerk's office, and it would be mere tautology to do so. It is true, that when the Clerk issues an execution, he writes the petition, judgment, &c. to which the execution is annexed ; but the judgment which goes out, with the execution, is only a copy from the minutes of the Court. It is not filed in the Clerk's office as a record. It is a mere fleeting paper, which runs from the sea coast to the mountains, and may linger for years in a sheriff's office, and perhaps be lost and never returned from whence it has been sent. Such a paper surely can give no additional security to the rights of the parties. If it should be said, that a judgment ought to be regularly entered up and filed in the Clerk's office, it may be answered that such has never been the practice in these

summary proceedings, and therefore such has never been the construction given to the act. And for what purpose shall it be done? It would be but a copy of what is already there, and therefore of less authority. It would be substituting a fugitive paper for a permanent and stable record of the Court, and therefore lessening the security which it afforded. If the party cannot maintain an action on the judgment in this form, he is without any remedy; as no other judgment is ever entered up, until the execution issues. And suppose an execution had been issued, and a copy were not produced, it would be inferior evidence, as every remove from an original always is.

I am of opinion that the action was well supported, and that the decision must be reversed. The motion to set aside the nonsuit is therefore granted.

• *Nonsuit set aside.*

HUDNALL VS. WILDER, Ex'r. Teasdale.

The Statutes of the 13th and 27th Eliza. against Frauds, only enacts the principles of the Common Law.

It is not the act of conveying voluntarily which renders the deed void, but the intention with which it is done.

Fraud always to be inferred from the circumstances.

Trustees of Holman vs. Greenwood, 1 Bay. 173, not a case of authority.

When a voluntary deed was intended to secure property from the reach of creditors, it is void against subsequent purchasers as well as creditors, where the possession has not been changed.

Whenever a deed is void, merely against creditors, the payment of the debts will cure the defect; but where it is attended with circumstances which authorize a belief that no change of property was actually intended to take place, but that it should revert to the donor, as soon as the debts are paid, the rights of a subsequent purchaser cannot be affected by the payment of the debts.

It seems there is no difference between cases of real and personal property, as to subsequent purchasers; and the Court will in both instances give effect to a bona fide sale without notice against a voluntary deed.

The English rule that the subsequent sale is to be preferred even in the case of notice, questioned, as not in accordance with the decisions in this country.

A vendor continuing in possession is regarded as to creditors or subsequent purchasers as the owner against the most solemn unconditional deed to a bona fide purchaser not in possession.

A purchaser from a trustee without notice will hold the property discharged from the trust.

But where the possession has been kept (as in the case of a father to his children) for the separate use of the donee and the profits and labor reserved as an accumulating fund for his benefit, it may repel the presumption of fraud.

Where a gift is made by a parent to a child and the possession is retained by the parent, it will depend on the particular circumstances of each case, whether the possession will be considered fraudulent or not.

The cases on that subject considered.

Steel vs. M'Night, 1 Bay. 64, thought a most extraordinary decision and of no authority.

There possibly may be cases where a subsequent purchaser would not be affected by notice; as where the voluntary gift be actually fraudulent, as distinguishable from cases unattended with any other presumption of fraud than what is to be inferred from the subsequent sale.

A purchaser with notice of a voluntary deed, in favor of those whom the grantor is under natural obligations to provide for, cannot be relieved.

This was an action of trover for a negro slave named Frank. The case had been tried before and a new trial granted. See the case reported, 1 M'Cord's Reports, 227. On the new trial a different case was made, which renders it necessary to make another statement. It appeared that one Luke Norris, then the owner of the slave in question, on the 13th Feb. 1809, conveyed this negro, with other property real and personal, to the plaintiff Hudnal, in trust for the sole and separate use of his (Norris') wife for life, with remainder to such children of the marriage as should be living at her death, remainder to himself.—Norris at the time the deed was made was very much in debt. In July, 1810, one Bicks sued Norris and obtained a judgment on a debt due to him before the deed of gift was executed to the plaintiff, and Norris took the

benefit of the prison bounds act in this case. This judgment was for upwards of \$300, but was not obtained before 1815. Ricks then filed a bill in Equity against Norris and Hudnal, and that Court ordered that so much of the property conveyed by Norris to Hudnal as would satisfy the execution of Ricks, should be sold. The Commissioner made a sale, satisfied the debt and paid the balance to Hudnal the trustee. In 1814, the lands contained in the deed had been sold by the Sheriff under an execution of one Richardson vs. Norris, and Hudnal bought it in for \$37, the amount of that execution. It was also proved that the negro Frank was sold by the Sheriff in 1815, under another execution against Norris, and bought in by Hudnal as trustee. This execution was only for \$20, which amount alone was paid by Hudnal; and for the protection of Hudnal, Norris gave the Sheriff a receipt for the balance of the purchase money. This execution, which was in favour of one Mullin, had been renewed from time to time until thus satisfied. On the 17th March, 1818, Norris, on the point of removing to the Western country, sold Frank to Teasdall, defendant's testator, for the sum of \$1000, which was paid in cash. A witness on the part of the plaintiff proved that he told Teasdall, about the time of the purchase, but he did not know if the money had yet been paid, that there was a deed for the negro Frank to Hudnal, and that he had better enquire of Hudnal, and that Teasdall afterwards told the witness that he had spoken to Hudnal who said he had a claim, but that he had not given him that satisfaction he could wish. Witness advised Teasdall that if he had purchased, to rescind the contract, but Teasdall replied that if the negro lived with him a certain number of years he would pay for himself. Witness thought the contract had been made. A witness on the part of the defendant proved that as soon as Teasdall obtained the bill of sale

Norris, he went to Hudnal to know if he had any claim on the negro, and that Hudnal said at first that he had, but afterwards said that he had not.

The case was tried before Mr. J. GAILLARD, and they found a second verdict for the defendant.

Wm. Mayrant, for the plaintiff, appealed and moved for a new trial, on the grounds that the voluntary deed was not fraudulent, and that Teasdall being a subsequent purchaser was not within the protection of the Statutes of Eliz.

Holmes, contra.

CURIA per NOTT, J. The cases involving the questions now submitted to our consideration, which have hitherto occurred in our Courts, appear to have been decided upon their particular circumstances, without reference to any general principle by which such cases ought to be governed. And when any general principle has been resorted to, it has been with a view to the particular case then under consideration, without laying down any system of rules to which the several classes of cases of this description may be referred. And although this case may be decided upon its own particular circumstances, yet the period will come, if it has not already arrived, when we must establish some general principles for the government of our decisions, which will give somewhat more certainty to the law on the subject than has hitherto prevailed.

I have always been of opinion that the Statutes, 13th and 27th Eliz. had introduced no new principle, but that they were merely declaratory of the Common Law. I am aware that the dicta of respectable Judges will be found to the contrary. But such was the opinion of Lord Coke and Lord Mansfield; and Chief Justice Marshall has expressed his concurrence in that opinion. Roberts on Fraud. Con. 19. 1st. Cranch 316, Hamilton vs. Russell. If, therefore, I have erred, it is some consolation to find

myself in the company of Lord Coke, Lord Mansfield and Chief Justice Marshall. But without relying alone upon illustrious names, it appears to me impossible to read those Statutes without coming to the same conclusion. The first declares void and of no effect, "all feigned, covenous and fraudulent feoffments, gifts, grants, &c. devised and contrived of malice, fraud, coven, collusion, or guile, to the end, purpose and intent, to hinder, delay, or *defraud creditors*." The other declares void and of no effect, all fraudulent and covenous conveyances of any estates, &c. made for the purpose and intent to *deceive* those who have or shall *purchase* the same. Those Statutes, therefore, make void only such gifts, sales, or conveyances as are covenous and fraudulent, and made for the purpose and with the intent to deceive and defraud creditors or bona fide purchasers. Now, I apprehend that there never was a time when the Common Law would not have made void covenous and fraudulent deeds, made for the purpose and with the intent to deceive and defraud either creditors or bona fide purchasers. These Statutes, therefore, it would appear to me, can be considered as nothing more than literal transcripts of the Common Law.

If it be said, that in the construction of these Statutes the decisions have gone much farther than the decisions at Common Law, it may be answered, that they have gone much farther than they ever ought to have gone, as I shall be able most satisfactorily to shew. But if those decisions can be supported by any just construction of the Statutes, the Common Law would have admitted of precisely the same construction. For after departing from the letter of the Statutes, all the rest is construction, and would as well have been justified by the Common Law as the Statutes.

But let us come to the case now under consideration.

It appears that Luke Norris, the owner of the slave in question, on the 13th of February, 1809, conveyed this negro with other property, real and personal, to the Plaintiff, in trust for the sole and separate use of his wife for life, with remainder to such children of the marriage as should be living at her death, remainder to himself.— Norris, at the time the Deed was made, was very much involved. He owed a Mr. Ricks three hundred dollars, and several other debts; and he afterwards took the benefit of the insolvent debtors act. It also appeared in evidence, that this Deed had been declared void by the Court of Equity, and that the property was ordered to be sold for the purpose of paying the debt of Ricks, or so much of it as was necessary for that purpose; but that all except some small debts had been paid several years before the sale of the negro to the Defendant's Testator.

It may here be remarked that this is the second application for a new trial in this case. On the former trial there was no evidence given of the debt due to Ricks, nor of the proceedings in the Court of Equity, nor of several other debts which have now been proved to have been owing by Norris, nor of his having taken the benefit of the insolvent debtors act. It appears that Norris always continued in possession of the negro, and used and employed him as his own from the time of the Deed of Trust up to the time of the sale to the Defendant's Testator. Several questions now arise out of this state of facts.

First. Was the indebtedness of Norris, at the time the Deed of Trust was made, such as to render it fraudulent and void?

Secondly. Did the subsequent payment of the debts render it valid?

Thirdly. Suppose him not to have been indebted at the time of the sale to the Defendants intestate, was that

sale, he being a bona fide purchaser for a valuable consideration, good against a prior voluntary deed?

Fourthly. If good without notice, would his having notice of the prior Deed render it void?

Fifthly. Was there sufficient evidence of notice in this case to entitle the Plaintiff to a verdict?

On the first question there can be no doubt, if we are to be governed by the English decisions which have taken place on their construction of the 27th Elizabeth. They go the whole length of declaring that a subsequent purchase shall prevail against a prior voluntary deed, even where the purchaser has notice of the voluntary deed. These, however, are cases involving titles to real estate to which the Statute exclusively relates. So that the question now is, whether the Statute admits of such a construction as to make a difference between the effect of a conveyance of real estate and the sale of goods and chattels, which must be governed by the rules of the Common Law? In addition to the observations which I have already made on that subject, I would further remark that the property of this country consists principally of land and slaves. These two species of property are so inseparably connected that one is comparatively useless without the other. The almost invariable habit of the country is upon settling off a son or daughter for a parent to give a portion of his lands and slaves as a provision for their support. Now, if a parent should be unnatural enough and dishonest enough to sell the same property which he had thus voluntarily conveyed, could it be contended that the voluntary conveyance of the land would be fraudulent and that of the personal property good? The Statute provides against conveyances made for the purpose and with the intent to defraud. It is not the act of conveying voluntarily which renders the deed void; but the intention with which it is done.

The Court therefore are not to look to the act alone, but to the motive. To be sure, the act may be taken as the evidence of the motive. But not more so in the one case than in the other. And it is difficult to comprehend how even a Statute of the British Parliament can make a person believe that a conveyance containing both real and personal estate, or cotemporaneous deeds, one conveying real and the other personal estate, attended with precisely the same circumstances and made for the same object, can be good as to one and fraudulent and void as to the other. Neither can the consciences of men be thus shackled by the most solemn decisions of Courts. Courts may decide what may be the legal evidence of fraud; but that being determined it must be the same whether it relates to lands or negroes. I do not mean to be understood that an inference of fraud is never to be drawn from the value of the property. Thus, for instance, a voluntary disposition of articles of the first necessity, such as household furniture, provisions, and such like articles, of which the donor is in the habitual use, cannot fail to excite a suspicion of fraud. But it would not arise so much from the nature of the property as from the improbability that a person would gratuitously divest himself of those articles which were necessary for his own immediate subsistence. For when he has a superabundance even of these articles it would afford no such evidence. The question then is whether we shall adopt the English decisions to the whole extent to which they have gone, or whether we shall give our own construction to the Statutes, and adopt a uniform rule both as to real and personal estate, or rather to enquire whether, what we shall think a correct construction of them will not lead to such uniformity. With that view it will be necessary to recur to the cases which have been decided in our own Courts to ascertain how far any principles

have been settled by those decisions, and what those principles are.

I do not know that any case has arisen under the 27th Elizabeth. I can find none reported. With regard to the voluntary transfer of personal property I can find but two cases which bear any analogy to this. The first is the case of Hamilton and Lambright, Trustees of Holman vs. Greenwood, et. al. 1 Bay. 173. In that case, Holman, the husband, made over several negroes to the Plaintiffs as trustees for his wife, being considerably indebted at the time. After having made such voluntary deed, he gave a mortgage of the same property to the Defendant to secure a debt which he owed previously to the making of the trust deed. And the question was, whether the trust deed was fraudulent as to the creditors and subsequent purchasers.—That is to say, whether the voluntary deed or mortgage should prevail. The reporter represents the Court unanimously to have laid it down, that fraud, or no fraud, was a matter under all the circumstances, very proper for the consideration of the Jury, and finally submitted the case to them, who found a verdict for the plaintiff. This then was only the verdict of a Jury, from which there was no appeal, and cannot therefore be considered of very high authority. But I presume that there can be but little doubt that such a verdict would not be supported at this day. It seems now to be well settled as a *rule of Law*, that a voluntary deed is void as to existing creditors whenever the donor is largely indebted at the time of making the deed. Chancellor Kent, in the case of Read vs. Livingston and others Johnson C. C. 481, goes so far as to hold that the least indebtedness, however small, will render a voluntary deed void. And none of the cases allow it to prevail except in cases of inconsiderable debts; such for instance as those current expenses which every man is supposed to

owe, and where he has at the time ample funds over and above the property so given.

Another case bearing some analogy to this, is the case of Teasdale vs. Reaborne, trustee of Mrs. Opie, 2 Bay. 546. That was an action brought by Rearborn, as trustee of Mrs. Opie, to recover certain negroes made over to him for her use by way of marriage settlement before marriage. The husband after marriage sold the negroes to Teasdale. But that was an antinuptial settlement made in consideration of marriage, and therefore was not voluntary, but was founded on what in legal contemplation is a good consideration. The Court however took the occasion to declare that a deed making provision for a wife or family is not void merely because it is voluntary. That in order to make it so, it must be made with a view to defeat bona fide purchasers or to defraud creditors. It was further held that the circumstances of the husband being indebted to the small amount of about twelve or thirteen dollars at the time of the settlement did not affect the case. The plaintiff therefore was permitted to recover a verdict against the subsequent purchaser from the husband. These cases therefore do not settle any thing with regard to the question now under consideration. But I apprehend there can be no doubt that when once it is seen that a voluntary deed is intended to secure the property from the reach of creditors it may also be considered as fraudulent against a subsequent purchaser. The fact that a fraud was originally intended, taken in connection with the subsequent sale, would very well authorize the inference that no change of property was intended to take place, and that the right still continued in the donor, unless such gift should be accompanied by possession separate and distinct from the possession of the donor. Possession of personal property always carries with it evidence of title, and is that kind of evidence of

which a purchaser is bound to take notice. If, therefore, the defendant's testator had purchased during the time that Norfolk was laboring under the load of debt with which he was encumbered at the time the trust deed was made, I have no doubt that the purchase ought to have taken precedence of the gift.

2. The next question is whether the subsequent payment of the debts rendered the trust deed valid. And here it is to be observed that a voluntary deed is always good between the parties. It is void only as it regards creditors or subsequent purchasers. It does not lie in the mouth of the donor to say that he intended it as a fraud, and therefore the donee shall not have the benefit of it. Whenever therefore a deed is void merely against creditors, the payment of the debts will cure the defect, but when it is attended with circumstances which authorize a belief that no change of property was actually intended to take place but that it should revert to the donor as soon as the debts were paid, the rights of a subsequent purchaser cannot be affected by the payment of the debts. Now what are the facts in this case. The debts were never paid but by a succession of law suits and by the compulsory process of law. As soon as the debts were paid, the donor resumed the right of disposing of the property. The plaintiff did not interfere when he was about to remove it to the Western Country. And when interrogated by the defendant's testator with respect to his right, refused to give him any satisfaction. And although the conduct of defendant's testator was not altogether free from suspicion, it did not excuse the mysterious conduct of the plaintiff. Indeed there is reason to believe that this is a speculation on both sides, and that neither party has any very strong claims upon the justice of the Court. It is one of those cases which appears to be so shrouded in obscurity, that it is difficult to discover

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its merits, and furnishes but little ground for the exercise of the judgment of the Court, and formed a proper case for the consideration of a Jury.

3. But let us suppose that no actual fraud was intended, it remains to be determined whether the fact that the donor continued in possession, used the property as his own, and exercised every act of ownership over it, and enjoyed the profits of its labor is not of itself in legal contemplation, sufficient evidence of fraud to render the deed unavailing against a subsequent purchaser without notice. And although I do not intend to give a conclusive opinion on that question, it is one of too much importance to be passed over without some consideration. It has already been remarked that the English decisions under the 27th of Eliza. have gone the whole length of declaring that a subsequent sale to a bona fide purchaser even with notice shall prevail against a voluntary deed. These decisions I shall undertake by and by to shew cannot be supported by any just construction of the statute. But as far as they have gone to declare that a subsequent sale to a bona fide purchaser, *without notice*, shall itself be evidence of fraud to avoid a voluntary deed I do not know that they have ever been questioned. And we have been so much in the habit of respecting the English decisions as authority on all their statutes which have been made of force here, that I do not recollect that we have ventured to put a different construction upon one which has come down to us through a train of decisions stamped with the approbation of the able Judges of that country; and although we may not always see the reason on which their decisions are founded, it is safer generally to trust to the experience of those who by their wisdom and learning are entitled to our confidence than to our own hasty views without experience. It would seem to me therefore, that unless we can make a distinction between

cases of real and personal property, and I have not been able to discover any, we must give effect to a bona fide sale without notice against a voluntary deed. And such I think has been the prevailing opinion in this State, as may be collected from the decisions to which I have already referred, as well as others. It appears to me also to result from the well settled principles of law in analagous cases. Possession is the highest evidence recognized by law of a right to personal property. A vendor continuing in possession, is regarded as to creditors or subsequent purchasers as the owner, against the most solemn unconditional deed to a bona fide purchaser not in possession. A purchaser from a Trustee without notice will hold the property discharged from the trust. These are the settled rules of the common law to which the common sense of the community yields a ready assent from the obvious tendency to fraud to which a contrary doctrine would lead. It may be said that as the object of the deed of trust in this case was to make provision for the wife and children who were living with the donor, his possession was consistent with the terms of the deed, and therefore furnished no evidence of fraud. And it is true that so far as a presumption of fraud is to be drawn from the variance between the terms of the deed and the possession, the argument is correct. Whenever therefore the property has been kept for the separate use of the donee, and the profits and labor reserved as an accumulating fund for his benefit, it may repel the presumption of fraud. But where it has been kept and enjoyed by the donor as his own and for his own benefit and when the gift is evidenced only by some deed locked up in his desk, or made by parol and recorded only in the tenacious memory of some family gossip to be called up at any indefinite period, or to be forever buried there, as occasion may happen to suit, such a possession must be considered as inconsistent with

the professed object of the deed as if it had been made to any other person and ought to be subject to the same suspicion. If such gifts or conveyances are to prevail against creditors and bona fide purchasers, it is impossible to foresee to what extent frauds may not be carried. The generality of expression used in some of our decisions would seem to authorize the inference that when a gift is made by a parent to a child, the possession and use of the property by the parent furnishes no evidence of fraud. But when those cases come to be examined it will be found that the decisions depended on the particular circumstances of each case and have settled no rule of Law on the subject. In the case of *Steel vs. M'Night*, 1 Bay 64, it appeared that a grandfather made a parol gift of a Negro Girl to his infant grand child. The donor continued in possession and used and employed the slave as his own until his death. She was then appraised and sold as a part of his estate and afterward came into the possession of the defendant as a bona fide purchaser. Eighteen years had elapsed before the plaintiff brought his action. Yet under the charge of the Court the plaintiff recovered and the defendant acquiesced in the verdict. I cannot help thinking that it was a most extraordinary decision. But being a mere circuit decision it is of no authority. And the case is of no importance except for the mischief it has done and the rich harvest which it has brought to the profession. The case of *Smith and Littlejohn*, 2 M'Cord, 362, was a gift by a parent to his child. But in that case the donor was not indebted at the time of the gift, and the creditor and subsequent purchaser were aware of the gift at the time the debt was contracted. The case of *Kid and Mitchell*, 1 Nott & M'Cord 339, was one of a similar nature and turned also upon the evidence of notice. So that it does not appear to me that any of our decisions stand in the way of any rule which we may now think proper to adopt.

4th. It is however contended that the defendant's testator was aware of the trust deed at the time of his purchase, which gives rise to the question how his title can be effected by notice. The cases in the English books which involve that question, are *Buckle vs. Mitchell*, 18 Ves. 116. *Pulvertoft vs. Pulvertoft*, *Ib.* 90. *Metcalf vs. Pulvertoft*, 1 Ves. and Beam. 133. *Otley vs. Manning*, 9 East 59. *Hill vs. Bishop of Exeter*, 2 Taunt. 69, and *Doe vs. James*, 16 East 212. In these cases and several others, it is held that a purchaser for a valuable consideration will hold against a voluntary donee even though he may have knowledge of the voluntary deed at the time of the purchase. And we are now to determine whether these decisions are to have a governing influence on our judgments. I have already expressed my opinion with regard to the respect due to the decisions of the English Judges on questions which have not been the subject of decisions in our Courts. And although this question may have been discussed, I do not know that it has ever been decided, and I am induced to think that as far as the question has been considered our Courts have entertained different views of the statutes of Elizabeth from the English Judges. When this case was formerly before this Court the question of notice seemed to constitute the most important feature of it. And in the case of *Grid and Mitchell* it is said that a deed is not void merely because it is voluntary; it is so only against creditors and subsequent purchasers *without notice*. There possibly may be cases where a subsequent purchaser would not be affected by notice. If the voluntary gift be actually fraudulent, notice to the subsequent purchaser cannot do away the fraud. If the voluntary deed be a mere pretence and no actual change of property be intended to take place, it still remains the property of the donor and may become the property of a subsequent purchaser even though he

may have notice of the prior deed. But I speak of cases unattended with any other evidence of fraud than what is to be inferred from the subsequent sale. If the decisions of the English Courts had come down to us supported and approved by the experience of the able Judges of that country and acquiesced in by our own we should not now perhaps be authorized to disregard them. But so far from coming with such recommendations, we find them deprecated by all the eminent Judges of the present day. In the case of *Buckle vs. Mitchell*, the Master of the Rolls says, "I have great difficulty to persuade myself that the words of the statutes warranted or that the purposes of them required such a construction; for it is not easy to conceive how a purchaser can be defrauded by a settlement of which he has had notice before he makes the purchase, 18 Ves. 110." In the case of *Pulvertoft vs. Pulvertoft*, Ib. 79, the Lord Chancellor observes, "the construction put upon the statutes is singular, that a man paying what in other cases is called paying an obligation of nature should be considered as within the penalty of these acts." In the case of *Otley vs. Manning*, 9 East 70, Lord Ellenborough uses the same language. Lord Mansfield, also, in the case of *Boshet vs. Martyn*, 1 New Rep. 332, expresses his regret that such a decision had ever been made. I think, therefore, that the question is still open for our consideration, and that we are at liberty to put our own construction upon these statutes, notwithstanding the unanimous decisions which have taken place upon them in England and perhaps in the other States. The English Judges do not now follow their own decisions because they are consistent with the letter or spirit of the Statutes, but because they have so long prevailed as to have become the rule of property and that to reverse them would be productive of more mischief than to persist in an error. Chancellor

lor Kent also says he inclines to the modern opinions expressed by the English Judges, but that a contrary doctrine has now taken too deep root to be shaken. But it cannot be said to have taken root here. Happily for us it has never been planted in this State. And the question now is whether we shall follow decisions which are admitted to be wrong or whether we shall profit by the experience of those distinguished Judges whose opinions are entitled to so much respect, and avoid their errors.—The professed object of the Statutes is to avoid deceitful and covenous conveyances, made with the intent and for the purpose of defrauding creditors and bona fide purchasers. But a deed intended to provide for those for whom we are bound by the obligations of nature to provide, is not fraudulent merely because it is voluntary; and he cannot be considered a bona fide purchaser who knowing of such voluntary conveyance combines with the donor thus dishonestly to defeat his own benevolent act. He cannot be defrauded who purchases with the knowledge of a pre-existing deed, but ought to be considered as an actor in the fraud rather than the voluntary donee. And such seemed to be the opinion of the court in the case of Kid & Mitchell above referred to.

It only remains then to be determined whether defendant's testator knew of the plaintiff's claim at the time of his purchase. I think there are strong reasons to believe that he had such notice. And that was the principal ground on which the former new trial was granted. The cause was tried in the first instance before me. I was not satisfied with the instructions which I had given to the jury on that point, and was therefore in favour of granting a new trial. The case has now undergone a second investigation under all the advantages afforded by a former trial. The evidence of fraud was much stronger on the last trial than the first and the evidence of notice I think

not so strong. It is probable that the Jury have had the benefit of all the light of which the case is susceptible, and having found two concurrent verdicts, I do not think the Court ought again to interfere. The motion is therefore refused. *New trial refused.*

GEORGE COTCHET vs. DIXON Executrix of DIXON.

The declarations of a witness, that he is interested in the event of a suit are not, per se, sufficient to deprive the party by whom he is called of the benefit of his examination.

To exclude a witness, it is not enough that he has an interest in the subject matter of litigation, it must be an interest in the event of the particular cause.

If the witness is not a party to the suit, the presumption is in favour of his admissibility, and the party objecting must shew his interest, which he may do by examining the witness on his voir dire, or by evidence aliunde.

This was an action on the case for selling to the plaintiff an unsound negro. John Thomas was offered as a witness for the plaintiff. Defendants attorney objected to his testimony on the ground of interest, and to support this allegation called upon other witnesses, who stated that Thomas had previously said he was interested. The plaintiff's counsel insisted that Thomas' previous declarations of interest did not render him incompetent and still offered him as a witness. The Court rejected him. The plaintiff's counsel then offered to swear Thomas on his voir dire in relation to his interest, which the Court also refused. The plaintiff's counsel then offered Thomas' release of all claims and damages against the defendant, which the Court also refused.—He then submitted to a nonsuit with leave to set it aside in the Court of Appeals on the ground, that Thomas' previous declarations of interest did not render him incompetent, and that he should have been examined on his voir dire as to his

interest ; and that his release should have been received for the purpose of rendering him competent.

Gregg, for the motion, cited 2 Starkie on Evid. 757.

Peareson, contra.

CURIA *per* JOHNSON, J. On the questions which have arisen in this case there has been great diversity of opinion, and the decided cases are so directly opposed to each other, that in the adjudication of our own Courts it will be necessary to have resort to principle as the only safe umpire between the authorities which are arranged on the different sides. In *Calston vs. Nickols*, 1 Ha. and J. 105, the declarations of a witness that he was interested in the event of the suit were admitted in evidence on an objection to his competency. A case corresponding with this in every respect and in which the Court not only said that the witness was excluded by his declarations, but that his competency was not restored by a release is anonymously reported in 2d Hayu. 340. On the other hand, in *Fernsler vs. Carlin*, 3 Serg. & Rawle 130, and *Pierce vs. Chase*, 8 Mass. R. 487, it was held that the witness was not excluded by his own declarations of interest. Without pursuing this collision further, it will be sufficient to refer to a note in Metcalf's Ed. of Starkie's Treatise on evidence, 2d vol. page 757, where all the cases are collected. The questions may be stated thus.

First : Whether the previous declarations of a witness that he is interested in the event of the suit, is such evidence of interest as will exclude him from being a witness. Secondly : Whether he is a competent witness for the party by whom he is called in the investigation of that fact.

As to the first, the law recognizes but one mode of establishing a fact by parol proof, and that is by the examination of a witness *ore tenus*, sworn to speak the truth,

and hence the rule that declarations of third persons are inadmissible. The declarations of a party when they operate against his interest are admitted on the presumption that they are best acquainted with their own rights, and judging from the known influence which interest exercises over the human mind it is a fair inference that he would not make such a declaration unless it was founded in truth. And for the same reason they cannot be used in evidence for him. So far, therefore, as this exception can be regarded as a departure from the principle, it has no application to the declaration of strangers. In the application of the principle to the question under consideration, it will be necessary to ascertain the effect and operation of the declaration on the rights of the parties.—The witness is not a party in the suit, and the defendant offers in evidence his declaration, the effect of which is to deprive the plaintiff of the means of recovering his right.—But let us change the situation of the parties, and suppose that in this investigation the matter in dispute involved the rights of the plaintiff and the witness, or the rights of the defendant and the witness. In the first case, they are the declarations of the one, operating in his own favour; and in the next, the defendant would be destroying his own right by proof, that the right was in the witness—so that in any possible modification of the principle the declarations of the witness cannot be regarded as evidence of interest in himself.

But there is another objection to their admissibility, noticed by Mr. Metcalf in the note before referred to.—It assumes the truth of statements made by persons other than the party himself, not sanctioned by oath or the forms of law, and enables a reluctant and unprincipled witness to deprive a party of the benefit of his testimony at his pleasure. I come, therefore, to the conclusion, that the declaration of a witness that he is interested in

the event of the suit are not per se sufficient to deprive the party by whom he is called of the benefit of his examination.

On the second ground, to exclude a witness from giving evidence, it is not enough that he has an interest in the subject matter in litigation—it must be an interest in the event of the particular cause. And it is a general presumption arising out of the nature of the thing, that all persons so interested are parties. There are, it is true, very many cases in which there may be disqualifying interests, and in which it is not necessary that their names should appear on the record; but the presumption of competency still attaches, so far as to throw the onus of shewing the interest on him who raises the objection. This he may do, either by purging the witness on his *voire dire*, or by evidence *aliunde*. But until the fact of his interest is established by the judgment of the Court, pronounced on the matter, the presumption must prevail; and it would seem to follow, that until his interest was established he ought to be examined. The examination of the witness, on the question of his interest, is strongly supported by necessity—assuming that he has no interest, and such has been before shown is the legal presumption. It could not be anticipated that the objection would be raised, or that the party by whom he was called could come prepared to repel evidence on that subject, and in such situation the witness himself would be more likely to furnish explanations of circumstances tending to shew an interest, than any thing else which the party would be able to furnish. The danger of allowing a witness to give evidence who is suspected to have an interest in the event of a suit, even on the question of interest, has not been overlooked on making up this opinion. It is thought, however, that a sufficient security against it will be found in permitting the circumstances tending to

shew his interest, to be used on the score of credibility. And this view is certainly more in consonance with the modern improvements on the rules of evidence, which incline to their admissibility.

Nonsuit set aside.

KINSLER vs. KYZER, et. al.

In an action against the bail, on bail bond, the judgment against the principal constitutes the true measure of damages.

The case of Bryce vs. Morton, was tried upon a writ of enquiry, where, if the plaintiff does not prove the extent of his damages, the jury may, at their discretion, give merely nominal damages. But the application of the rule, even to that case, is questionable.

This was an action of debt on a bail bond. After a ca. sa. had been issued, and after the Court to which the writ in this case was returnable, the bail offered to surrender the principal.

JAMES, J. who heard the case, charged the jury that it was too late to surrender the principal and that the bail were fixed, and that the measure of damages was the amount of the judgment and costs in the case against the principal.

The jury found for the plaintiff, the amount of the judgment and costs against the principal.

Butler, for the defendant, moved for a new trial, on the ground of error in the charge of the judge. He cited the case of Bryce vs. Morton, 1 Nott and M'Cord, 65.

M'Clintock and M'Cord, contra.

CURIA per JOHNSON, J. This Court concurs in opinion with the presiding Judge, that in an action against bail, the judgment against the principal constitutes the true measure of damages.—Murdon vs. Parman, 1 M'Cord, 128. The case of Bryce vs. Morton, 1 Nott and M'Cord

65, relied on by the counsel for the motion, does not sustain the position taken. Without saying more of that case, it will be sufficient to remark, that it was upon a writ of enquiry, in relation to which, as a general rule, when the plaintiff does not prove the extent of his damages, the jury may, in their discretion, give those that are merely nominal. Its application to that case may perhaps be questionable; and that it is not to this, can admit of no doubt. This is an issue and the proof, so far as appears from the report, was plenary, and the jury was bound to find the verdict they did.

New trial refused.

LAW CASES
ARGUED AND DETERMINED IN
THE COURT OF APPEALS,
OF
SOUTH CAROLINA,
IN
NOVEMBER TERM, CHARLESTON, 1827.

JUDGES PRESENT.

HON. ABRAHAM NOTT, *Presiding Judge.*
HON. C. J. COLCOCK,
HON. DAVID JOHNSON.

THE STATE VS. FARLEY.

A libel is a censorious or ridiculing writing, picture or sign, published with a mischievous and malicious intent, towards government, magistrates, or individuals.

On an indictment for a libel, words spoken by the defendant cannot be given in evidence, in support of the innuendoes.

The following words were held not libelous, "As Mrs. Reynal says she has been most cruelly censured without a cause, which is absolutely false, I would advise her, &c."

So, "I would advise her to beware, lest facts, which are stubborn things be brought to light, and you will then see who you keep under your roof," was held not libellous.

There must be a malicious and mischievous intent to constitute a libel.

This was an indictment for a libel.—The writing set out in the indictment was the following letter from the defendant to William Rouse, in whose house the prosecutrix, Jane Reynal, lived :—“ Dear Sir, as Mrs. Reynal says ~~she~~ has been most cruelly censured without a cause, which is absolutely false, I would advise her to beware, lest facts, which are stubborn things, be brought to light, and you will then see who you keep under your roof. She need not go among her female friends and say she has been cruelly censured, as from her general character, which is perfectly and universally known, we are sure to hear all she says; yours, &c. John Farley.” The indictment commenced with the usual declarations, as in cases of slander, that the prosecutrix was of good fame and reputation, and beloved by all her neighbours, &c. and not guilty of the crimes of murder, theft and adultery, or any of them; but that she held the good esteem of many good citizens, and among others of William Rouse, the grand-father of the prosecutrix’s husband, William Reynal, and that she enjoyed the confidence of the said Rouse to such a degree that he permitted her to live in his house and family, and that the said John Farley, before publishing the writing complained of, and his wife Agnes, had raised and circulated certain false and slanderous reports of, and concerning the said prosecutrix, that she was guilty of adultery, murder and theft, which reports came to the hearing of the said Rouse, among other good citizens, to whom the said prosecutrix complained thereof, and of the conduct of the said Farley and wife, in attempting by such base means to injure her character, the said John, wickedly and maliciously and contriving, &c. to injure, &c. and to cause her to be turned out of doors by the said Rouse, and to induce him to believe, &c. on the day, &c. a certain false and libellous writing, &c. the defendant made, framed and published, &c. of,

and concerning the said prosecutrix, the writing complained of, (setting out at the same time the letter, with the usual innuendoes,) and that if she denied the reports, that he, the defendant, would prove them, and that she, the prosecutrix, was guilty of a falsehood, and that if she said Rouse knew her crimes he would turn her out of doors.

On the trial of the case, evidence was offered to prove that the defendant had uttered the verbal slanders charged in the indictment, which evidence being objected to by defendant's counsel, was rejected by RICHARDSON, J. presiding.

William Rouse was then sworn as a witness on the part of the State.—He said, he believed the paper then shewn to him (the supposed libel) to be in the defendant's hand writing—that it was sent open—that Mrs. Reynal received it and delivered it to witness—that she lived with witness and had his confidence—that he, the witness, made no answer to the letter, and that the letter related to Mrs. Reynal. This was all the testimony given, and his Honour, in charging the Jury, stated to them, that the words, “as Mrs. Reynal says, she has been cruelly censured without a cause, which is absolutely false,” contained in the paper, necessarily imported that Mrs. Reynal was a liar and were clearly libellous. The Jury under the charge of the Court, found the defendant guilty, and the defendant appealed, and moved to arrest the judgment, or for a new trial.

Rice, for the defendant, contended that the paper charged to be a libel, was not libellous in itself, and that there were no circumstances or facts connected with it, either alleged in the indictment, or proved on the trial, to make the letter libellous. That the indictment was defective in alleging the supposed libel, to be to the great scandal, infamy and disgrace “of the said Jane Farley,” and not

"of the said Jane Reynal." That there was no sufficient proof on the trial, of the defendant's having written, or published the supposed libel. That the inuendoes in the indictment referred to the previous averments, and proof of those averments having been decided to be inadmissible, the foundation upon which the paper was by the record proposed to be made libellous was destroyed, and the presiding Judge, on that ground, should have directed the Jury to acquit the defendant; and that the opinion expressed by the presiding Judge to the Jury, that the words, "as Mrs. Reynal says she has been cruelly censured without a cause, which is absolutely false," necessarily imported that Mrs. Reynal was guilty of falsehood, and were clearly libellous, was incorrect, as the words were susceptible of a meaning perfectly innocent, and were in no sense, justly imputable to them, libellous.—That the verdict of the Jury was contrary to the evidence, and particularly in finding the defendant guilty of publishing the libel, with the meaning affixed to it in the indictment, when the facts by which that meaning was to have been made out were not proved, and the evidence offered to that point, rejected by the Court. That the circumstances of the case rebutted the presumption of malice in the defendant, and the purposes for which the letter was intended, exempted it from the charge of libel.

Petigru, attorney-general, contra.

CURIA per JOHNSON, J. The evidence offered in support of the inuendoes contained in the indictment against the defendant, was, and I think very properly, rejected by the Court; but the verdict is, notwithstanding, right, if the paper writing set forth contains within itself, without the aid of the inuendoes, libellous matter. The inuendoes maybe rejected as surplusage. Such is the rule laid down in the case of *Roberts vs. Camden*, 9 East.95, and for the purposes of this motion, it was enough to inquire

whether the paper writing here set out did not contain such matter. To ascertain this, it will be necessary, first, to determine what a libel is. In *Villars vs. Monsley*, 2 Wilson 403. Wilmot, C. J. says, if a man deliberately and maliciously publish any thing concerning another, which renders him ridiculous, or tends to hinder others from associating or having intercourse with him, an action lies. But a more comprehensive and perhaps a more correct definition is given by Counsellor Hamilton in the case of the *People vs. Croswell*, 3 Johnson, 334, and is recognized by the Supreme Court of New-York, in *Steele vs. Southwick*, 9 Johnson, 215. A libel, says he, is a censorious or ridiculing writing, picture, or sign, made with a *mischievous* and *malicious intent* towards government, magistrates or individuals. We will now proceed to examine this paper with reference to these definitions, and enquire whether it contains any thing which is, *per se*, libellous. The affirmative rests on the assumptions—1st. That it contains a direct and positive charge that the prosecutrix, Mrs. Reynal, had been guilty of telling a falsehood, upon which the opinion of the presiding Judge turned. But, I think, that conclusion does not necessarily follow from the expressions themselves, nor is there any thing connected with them to aid that construction. The language is, “As Mrs. Reynal says she has been most cruelly censured without a cause, which is absolutely false, I would advise her,” &c. Now, although it may be possible to torture this expression into a charge against her, according to its obvious meaning and natural import, it is a simple negation of a charge made against him, that he had cruelly censured her without a cause; and altho’ the language is not, perhaps, the most courtly, the idea conveyed is, that he had not censured her without a cause. In the case of *Steele vs. Southwick*, 9 Johnson’s Rep. 416, the Court assume it as a principle univer-

sally admitted and well understood, that a publication simply denying charges imputed to the author and confined exclusively to that object, is not libellous whatever may be its contents. The malicious and mischievous intent necessary to a libel is wanting. The motive is the vindication of himself, and not to render his accuser ridiculous, or to hinder others from associating or having intercourse with him, as in the definition of Chief Justice Wilmot, nor is it censorious according to Counsellor Hamilton.

The second assumption is, that the insinuation that she was an unfit inmate of Colonel Rouse's house, to whom the letter was addressed, is libellous. Here, again, we have nothing to aid us in the interpretation. The language is, "I would advise her to beware, lest facts, which are stubborn things, be brought to light, and you will then see who you keep under your roof," &c. Now, here there is no specific charge against her that is either immoral or criminal, or that would necessarily exclude her from society; but we are left to conjecture the worst, or to fancy some error or foible which the writer might have supposed he had detected in her, but which she herself, and the majority of mankind, might have esteemed a virtue. Let us suppose, for instance, that the insinuation was founded on the belief that she was a prude, or that she professed the Roman Catholic faith, who but a libertine, or an intolérant bigot, would impute this to her as a crime or immorality, and yet from any thing that appears, this, or something like it, might have been the motive; but on the contrary, it might have had reference to the most criminal charges, and the objection is not, that it does not, but that it has not been made to appear. Nothing but that which is criminal, immoral or ridiculous, can be libellous, and it is incumbent on the prosecution to stamp that character on this transaction. There is nothing in

the paper itself, or extrinsic of it, which has been brought to light to fix its character. It contains in itself no specific charge of any thing immoral or criminal, or which is calculated to render the prosecutrix ridiculous, or to exclude her from society, and is not, therefore, libellous. On these grounds, therefore, the motion must prevail, and the consideration of the other grounds stated, are rendered unnecessary. *New trial granted.*

CORBETT vs. LUCAS & DOTTERER.

Every valid contract must have a good or valuable consideration, and when set out in pleading either as the foundation of an action or by way of defence it must appear on the record. There can be no such thing as a release after contract broken, except by deed, and it must be so pleaded.

A party may bind himself by parol to release, but it must be on sufficient consideration, and although such a contract may furnish sufficient ground of defence, as payment, accord and satisfaction, &c. yet technically it is not a release.

If the release is under seal, it implies a consideration, otherwise if not under seal, and the consideration must be proved.

This was an action brought on a joint note against Lucas & Dotterer, as co-partners. Before the trial Lucas died, and his death was suggested on the record. Dotterer pleaded a several special plea, that since the time of the making of the said note and as it appeared on the face of the proceedings, since it became due, Corbett the plaintiff had discharged Lucas one of the partners; and so claimed the benefit of that discharge as a release in law to himself; but he omitted to state that the release or discharge was under seal. Whereupon the plaintiff demurred generally, and on joinder in the demurrer, the case was argued before Mr. Justice GANTT, who overruled the demurrer.

H. S. Legare for the plaintiff appealed, and in favour of the demurrer made these points, viz. That the rule of

pleading was express, that where a debt is due, the release must in all cases be pleaded as under seal; and secondly, that there is no such thing known to the common law as a release not under seal. It appeared on the face of the record that this debt was due, when the discharge is said to have been made and the discharge could only be by deed, and must have been so pleaded even by Lucas, a fortiori, where it is a joint maker who wishes to have the benefit of a release in law. The rule of pleading was to be found in Lawes on Assumpsit, 639, 635, 641. "If the release be made after the promise broken, it must be pleaded as under seal." Now the greatest stress is to be laid upon a rule of pleading which like a maxim, is an authority not to be impeached or questioned. It not only shews what the law is, but what has been universally and uniformly recognised as law. As Ld. Coke expresses it. "Note, one of the best arguments or proofs in law is drawn from the right entries or course of pleading, for the law itself speaketh by good pleading, and therefore Littleton, Sec. 170, saith, "It is proved by the pleading, &c." as if pleading were *ipsius legis viva vox*. Co. lit. 115, b, (126 a. 283 a. 17 a. 10 Co. 88,) and in the same place (115, b, Co. lit.) Ld. Coke mentions the *original writs*, as together with Year Books, Reports, &c. one of the great sources from which we are to derive our knowledge of the common law.

So in *May vs. King*, *Ld. Raym. 680*,^{12 L.R. 537} which was *indebitatus assumpsit*, defendant pleaded that there had been various dealings, &c. and that in consideration of defendants promise to pay the balance found due on the account, the plaintiff did discharge him of the debt. In giving judgment on demurrer, HOLT, C. J. observed that although a promise *before breach* might be discharged by parol, yet that afterwards it cannot be discharged but by deed by any new agreement without *satisfaction*, and if the par-

ties without coming to an account agree to be quit against each other, it is clearly not a sufficient plea, *nor need it be shewn for cause of demurrer*, (that is. *general demurrer* is good.) And he also observed that the case quoted out of the Mod. Rep. (Milward vs. Ingram, 1 Mod. 205,) was the first of the kind, and by his consent should be the last; for *it was nothing like a bond accepted* by the plaintiff in satisfaction, &c. which though no payment be made, *yet being a security under seal*, extinguishes the original simple contract debt; and so in other cases, account stated, agreement to account, &c. have been held insufficient pleas. So, Co. Lit. 373, a. In some cases the law *will admit no proof except that which the law presumeth*, as if a rent be behind for 20 years and the lord make an acquittance for the last that is due, all the rest is presumed to be paid, and the law will admit no proof against this presumption. Upon which Mr. Hargrave remarks (note 2,) that this is to be understood as an acquittance under hand and seal, for if it be not *under seal*, the law will admit of no proof to the contrary, (1 Sid. 44. 1 Lev. 43. 1 Saund. 285, &c.) and this law of receipts is now quite familiar. So in the analagous case of *accord and satisfaction*, accord pleaded without averring satisfaction is bad. Cumber vs. Wayne, Str. 426, per PRATT, C. J. (in error) and though Lord Ellenborough threw out some doubts about the authority of that case in *Heathcote vs.* — he ultimately acquiesced in it, and said it was only the law of *Pinel's case*. See 1, Selw. N. P. 134. So an action of trespass may be discharged by contract or agreement commonly called *accord and satisfaction*, Dyer 75, pl. 23. But there must be a consideration, i. e. something advantageous to the contracting party. Hence *re-storing* the plaintiff his chattels or his land, of which the defendant has wrongfully dispossessed him, will not do. Hamm. N. P. 71.

Even in Equity, a plea of a release must set out the consideration on which it was made, as a release *without consideration* could not avail; 2 Sch. and Lefr. 728.— And a release pleaded to a bill for an account, must be under seal; and if not under seal, it must be pleaded as an account stated only; Mitf. Plea. 213. Finally, the very authority on which they most rely to shew that a release to one of two joint obligors enures by way of release in law to the benefit of the other, is fatal to the plea. Littleton speaks of no release not under seal, and it is said in terms “release by *express words* can only be by deed;” Co. Lit. 564, b.

“And the same law, says he, is of a right of action,” Co. Lit. 232, a. note 1, 144, Cro. El. 762. The text of Littleton runs thus, “If two men doe a *trespasse* to another, who *releases to one of them by his deed, all actions personal*, and notwithstanding such an action,” &c. A release not by deed without consideration executed, after a breach of promise is void; 13 John 87, Crawford vs. Millspaugh.

And where it is said that a contract *executory* may be released by parol, it is meant *si res sit integra*, where nothing has been done, and consideration as well as performance is *in futuro*. I will give you 5 shil. if you will go to the top of St. Paul’s; 3 Lev. 237. Lawes Asst. or in such contracts as insurance and bottomry, where no *risk*, no *premium*. The parties saying to each other, “let’s be off.” A *fortiori*, where a debtor has to avail himself of the discharge of his co-debtor; 7 Johns Rep. 207; expressly so ruled.

Here it is proper to remark that they who speak of *our* taking advantage of technical strictness, do not see with both eyes. This imputation may more justly be cast on the other side. By the rigour of the English law, a release to *one* is a release to *all*. Not so in the civil law; Pothier Oblig. p. 2, c. 3, art. 804. We act with no more

than an even handed justice. We wish to mete out to them the same measure they have meted to us, and pay them back in their own coin.

So much for the authorities.

Notwithstanding the able argument in *Stoney vs. McNeile*, a *release not under seal* may with strict propriety, be called *nudum pactum*. What is it in reality? How is it pleaded? I admit it was agreed I should do so and so, but it was afterwards agreed that I should not: it is agreement against agreement. That a release is a *pactum* is taught not only, 1st by our common lawyers, but, 2dly by the civilians. They admitted of formal release by *acceptilatio*. *Quod tibi debeo acceptum habes? Acceptum habeo*. A discharge in any other form was considered as a mere *pactum de non petendo*, which by strict law, operated nothing, and was only enforced by the Pretor's extraordinary equity; Inst. 4, tit. 13, s. 3; Poth. part 2, c. 6, s. 1. As their most solemn contract was by stipulation of a set form of words, so this discharge of it was one merely; 3dly, by the writers *de jure naturæ et gentium*. Thus Heineccius in his *Prælect.* on Puffendorf defines it.—“*Remissio seu condonatio est pactum quo obligatio unius alterius liberalitate tollitur;*” p. 207. Domat B. 1, tit. 1, sect. 1, defines a covenant to be “the consent of two or more persons, to enter into some engagement among themselves, or to *dissolve a former* engagement or to make a change in it. This universal consent *lex naturæ putanda est*. It *must* be founded on reason, and we return to shew what that reason is.

What is a *release*? To answer this question we must ask another. What is an *obligation*?

Judge GANTT said, *unumquidque dissolvi, &c.* That does not apply to any but *merely executory* contracts as *above*; so in the civil law *consensual* contracts might be discharged by *dissensus*, but not so if a *thing* had been

delivered, as *depositum*, &c. So *indebitatus assumpsit* will lie on special contract performed, 7 Cranch, 299, Bank vs. Paterson. The *consideration* is a distinct substantive cause of action, independently in some sort of the contract.

By the common law a contract, &c. is a chose *in action* so that the definition of a right of action, is a definition of a contract, *jus persequendi in judicio quod sibi debetur*; and a release of it is a promise not to bring an action, Co. Lit. 264. It is a *jus* not in *re* but *ad rem*, and a *res* is necessary. Per. Inst. de actio.

The *actiones in rem* were—

1. Vindicatio.
2. Jure possessionis : actio Publiciana.
3. Servitutis : actio confessoria et negatoria.
4. Pignoris : Serviana.
5. Hereditatis.

The notion of a *release* at common law, is precisely the same as of an *acceptilatio quod tibi debeo acceptum habes ? Acceptum habeo*. It does not *extinguish the debt*, it estops the creditor as evidence that he is paid, on a *presumption juris et de jure*.

A and B are named obligors, *jointly* and *severally*, and A only seals a bond, and then the obligee releases to A and after B seals the deed, the release shall enure to the benefit of B, for the release does not defeat the deed; but is only a bar by plea and both were barred for one and the same debt, which is satisfied by the release, Cro. El. 161. Si in judicio tecum actum sit, sive in res sive in personam, nihilominus obligatio durat et ideo ipso jure de eadem re postea adversus te agi potest, sed debes per *exceptionem rei judicatæ adjuvari*; Voet. p. 909. 5 inst. de except.

Indeed I find in note 144, on Co. Lit. 232 a, from Nottingham MSS, 17 Car. B. R. two were bound jointly and severally. Plaintiff sued both, and afterwards entered

a *retraxit* against one; whether that discharged the other was the question. *Berkly* said it did, for it amounts to a release in law, as the plaintiff *confesses thereby that he had no cause of action*, and *retraxit* is a bar to the action, and the plaintiff by his act has altered the deed from joint to several, and therefore, the other shall have advantage from it. Co. Inst. contra. for a *retraxit* is only in the *nature of an estoppel*, and therefore the other shall not have advantage; neither is it a *release*, though it be in the nature of a release, and if the obligee sues both and then covenants with one not to sue farther, that is in the nature of a release, but the other shall not take advantage of it; and in 21, H. 6 it is said that there must be an *actual release* to one obligor to discharge the other. Therefore, making a debtor an executor, is a release from the debt. So if a man covenant that he will never sue, it amounts to a release; Cro. Eliz. 352 for convenience sake.

Then consider the doctrine of *Kinaston vs. Lacy*, that a release of *the action* to one shall not be a bar for the other, i.e. a distinction between *release* properly so called, viz. acknowledgment of satisfaction by fit words of defeasance and *covenant not to sue*; 2 Salk. 575, S. C. better reported Ld. Raym. 688.

Here remark that *joint* and *several* is the same as *joint* alone; and *covenant not to sue* one is no bar. The *release* to one, is release in law to the other.

General demurrer was proper, see *May vs. King*, above Lord Raym. 680. *Rogers vs. Payne*, 1 Selw. N. P. 536. Gen. dem. for that covenant to pay money which was by *deed*, could not be discharged but by *deed*, and of this opinion was the Court. *Blake's case*, 6 Rep. 44 a. was cited, (2 Johns. 448.) So where submission is that the award should be in writing under his hand and seal, it is not sufficient to aver that it was in writing without more, and in such case general demurrer is allowed; 2 Saund.

62 a. note 3. Bac. Abridg. Pleas, K. 2. So here the release must be under seal, therefore, &c.

And if it be said that consideration is admitted by the demurrer, I answer that none is set forth and the mere word is not enough. See Archbold Civ. Plead. 232. It ought to have been shown *what* consideration, that the Court might judge; 1 Saund. 49. For where any thing is omitted that is necessary to give certainty to the statement, it shall be taken most strongly against defendant; Co. Lit. 303 b. Plowd. 46 a. Debt on bond: plea payment, intended *after* the day, if not averred, and then deed must be shewn by pleading to be otherwise; or otherwise it shall not be intended; Cro. El. 571. Lord Raym. 1537—38.

Where defendant in bar of plaintiff's right of action, pleads such an agreement as cannot be the subject of suit unless in writing, he must plead it to be in writing, that the Court may see whether there is satisfaction; 1 Phil. Evid. 335.

Eggleston, contra. A bill of exchange may be discharged by parol; Doug. 247. 1 Campb. 36. A bond may be assigned without seal, 1 Nott & M'Cord, 249.

CURIA, *per* JOHNSON, J. It is a well known rule of pleading that in setting out a contract, whether as the foundation of an action or by way of defence, it is incumbent on the party acting to exhibit on the record such a contract as his adversary is bound in law to perform.—Now it is of the essence of every contract that it should have for its basis either a good or valuable consideration, else it is nudum pactum and will not bind, and according to the rule, this fact should appear on the record. Contracts by deed on account of their solemnity, pre-suppose a consideration past, and for that reason, it is not necessary in setting them out, that a consideration should be averred, and hence the rule so fully established by the authorities

cited in the argument, that technically there can be no such thing as a release after contract broken, except by deed, and that it must be so pleaded, vide Co. Lit. 115 b. 373 a. Ld. Raym. 680, 1 Mod. 205, Bacon's abridgement Title plea, K. 2. That a party may bind himself by parol to release, no one will question, but then it must be according to the principle founded on a sufficient consideration, and such a contract although it may furnish sufficient ground of defence, as payment, accord and satisfaction, &c. technically, it is not a release. In the case under consideration, the release set out in the defendant's plea, is, after promise broken. It is not by deed, nor is there any consideration stated, and in point of fact, the release which has been introduced on the argument does not express any consideration. The plaintiff is therefore entitled to judgment on the demurrer, and it is accordingly ordered.

Judgment for the demurrer.

THE STATE VS. M'BRIDE.

A conviction and fine, for retailing liquors, without a license, does not operate as a license to retail for a year.

When the offence charged includes in its nature a succession or continuation of acts, which do not necessarily belong to any particular period, as public nuisances, &c. the indictment may so charge it, and any fact going to establish it, anterior to the finding of the bill, may be given in evidence, and a conviction would be a bar to another prosecution for any such act committed before the finding of the bill in the first indictment.

So, if a person is convicted of retailing without a license, such a conviction will be a bar to another prosecution for retailing at any time anterior to the finding of the bill in the first indictment.

To retail or open a tavern for one day without a license, completes the offence, and if it continues for a month or a year, it is no more, because the offence is in its nature continuous.

A single act of retailing may furnish a presumption of the consummation of the offence; but the proof of it would be more conclusive, if it consisted of a continuation and succession of acts, giving a decided character to the transaction. The idea of continuity is inseparable from it.

The defendant was indicted in three several cases for retailing without a license. Having been convicted on the first indictment, which charged the offence to have been committed on the 11th day of August, 1823, anterior to the time of finding the bill in the case in which he had been convicted, he pleaded that conviction in bar of both the other indictments, which alledged the offences to have been committed on different days, within a year of the day charged in the first indictment, and insisted that the penalty imposed by the act was a commutation of the license, and that an indictment could not lie for a second offence committed within twelve months after the one for which he was convicted. The court over-ruled the plea, and on the trial the defendant was convicted. A motion was now made for a new trial.

Martin, for the motion.

Elmore, solicitor, contra.

CURIA per JOHNSON, J. The Legislature have not in express terms provided that a conviction for retailing

spirits without a license, should operate as a license to retail for a year, or in the language of the brief, that the penalty imposed was a commutation for the license, and I know of no case, rule or principle, which would authorize the court to come to such a conclusion. It would indeed be rather a strange deduction that a conviction for an offence expressly prohibited by law should operate as an authority to the accused to go on in the commission of the same offence. There is then no foundation for this ground.

A question of some difficulty arises out of the facts reported by the presiding Judge. He states that this indictment charges the offence to have been committed before the bill on which he was convicted was found by the grand jury, and the question is, whether that conviction is not a bar to this prosecution on the ground, that every act of retailing prior to that time, constituted a part of the offence, and was admissible in evidence under the prosecution. When offences are, in their nature, distinct and independent, as murder, theft, &c. a conviction for one offence, would be no bar to another prosecution for another offence of the same nature, although it is charged to have been committed on the same day—1 Chitty's Crim. Law, 188. 229. But when the offence includes in its nature a succession or continuation of acts which do not necessarily belong to any particular period, but from the daily habit and character of the offence, as public nuisances, bawdy houses and the like, the indictment may so charge it, and any fact going to establish it, anterior to the finding of the bill, may be given in evidence, and consequently a conviction would be a good bar to another prosecution for a fact committed before the finding of the bill—1st. Chitty's Crim. Law, 189. 230. and the difficulty in this case, is in determining to which of these classes of cases this offence belongs. The acts of

1784, 1st. Brev. 418, and 1801, 1st. Brev. 420, both relate to this subject and together constitute the entire system, and without entering on a minute analysis of all their provisions, so far as this case is concerned, their spirit and meaning may be summed up in the following words, viz. that if any person or persons shall retail spirituous liquors, or keep a tavern without a license, they shall for every such offence forfeit and pay the sum of \$100. The words every such offence, which are used in the act of 1824, it is said is conclusive on this question, and clearly refer each act to that class of offences which are denominated distinct and independent, and consequently that each act was the subject of prosecution.— But this, I think, is *petitio principii*; for if the offence consists of a single act, or if it consists of a continuation of the same acts, it is yet but one offence, and we are left precisely where we would have been if those words had not been used in the act. The principle cannot, I think, be better illustrated than by the very case provided for in these acts. They prohibit the keeping of a tavern without a license; and what is it that constitutes the fact of keeping a tavern? It consists in opening a house for the reception and accommodation of all that may come, and receiving a compensation therefor. Now, if this be done but for one day, it completes the offence; and if it is continued for a month or a year, it is no more, because the thing is in its nature continuous; and so I think, with regard to the offence of retailing. A single act may furnish a presumption of the consummation of the offence, but the proof of it would be more conclusive, if it consisted of a continuation and succession of acts, giving a decided character to the nature of the transaction; besides, the idea of continuance is inseparable from it.

Again, retailing consists in dealing out in very small quantities, and every separate act bears so strong a re-

semblance to the others. that, so to express it, they have no ear mark by which one can be distinguished from the other, and the danger of subjecting the accused to be twice punished for the same offence, furnishes an additional reason for referring it to that class of cases, where the mode of prosecution and the nature of the evidence to be given would shield them from it, and which, I think, is clearly admissible by the rules of law. The case is therefore ordered back for a new trial.

Norr, J. concurred.

Colcock, J. I dissent.—I cannot perceive any thing in the act of retailing which is continuous. As to the evidence to prove the fact, it is as easy of application as in any other case.

New trial granted.

The STATE vs. LAVAL, City Sheriff.

By the English law, a mortgage is a conveyance of land as a security for money to be paid in future, and defeasible upon the payment of the money within the time prescribed. If the money be not paid according to the contract, the deed becomes absolute, and the fee of the land is vested in the mortgagee.

In Equity, however, it is considered in the nature of a pledge, and that Court will interpose its authority and extend to the mortgagor further time to redeem, although his remedy is lost at law. That is what is called an equity of redemption.

But by our act of 1791, the fee continues in the mortgagor, and the mortgagor is entitled to redeem even after the time stipulated.

Under this act the right to redeem is a legal right, and does not require the aid of the Court of Equity.

A mere equity is not the subject of an execution, and though in England an equity of redemption cannot be levied on, yet here the right of the mortgagor being a legal one, may be levied upon and sold.

¶ The purchaser takes the place of the mortgagor, with all his rights, privileges and disabilities.

If the land be sold under an execution older than the mortgage the purchaser takes it discharged of the mortgage, and if he purchases under the mortgage, he takes it subject to the judgment.

If land be sold under a junior execution, the purchaser acquires a good title, and the money is applied to the several executions according to their priority.

The execution is considered as a mere authority to sell without regard to the distribution of the fund afterwards.

It seems that judgments and executions, though dormant, preserve their liens for any indefinite period of time.

Where a purchaser buys under an execution, there being a prior mortgage, he takes subject to the mortgage, and may redeem.

But where there were prior and subsequent judgments and an intermediate mortgage, and the purchaser bought under a judgment subsequent to the mortgage, on a rule against the Sheriff by the owner of the subsequent judgment to shew cause why the money was not paid over to his execution, the Court refused to decide the rights of the parties on a rule, and thought the remedy was in Equity, the prior judgment and mortgage creditors to be made parties.

This was a rule upon the Sheriff in the City Court, for not paying over money collected on an execution of J. R. Morgan. The Sheriff shewed for cause why the monies had not been paid over, that the fund in his hands had

been claimed by different parties. It appeared that he had levied on a house and lot in the City of Charleston, the property of Frederick Naser, by virtue of an execution at the suit of James R. Morgan against the said Frederick Naser; that there had been several judgments obtained both in the City Court of Charleston and in the Court of Common Pleas for Charleston District, against the said Frederick Naser, previous to the judgment obtained by James R. Morgan, but that the said F. Naser, after those judgments were obtained, but prior to that of Morgan's, had executed a mortgage of the said house and lot to one John Stent, which mortgage was properly recorded, and that Morgan's judgment was the eldest of those against Naser, subsequent to the mortgage. At the sale, under Morgan's execution, the property brought three hundred and ten dollars, and he now claimed that the nett amount of the proceeds of the sale should be paid to him. The elder judgments also claimed the amount in the Sheriff's hands, and the Recorder directed that the fund should be applied to the eldest judgment, and gave the following reasons :

The RECORDER. The case ex parte the City Sheriff, 1 M'Cord, R. 399, decided that when a levy and sale were made of mortgaged lands under a subsequent execution, nothing passed to the purchaser but the defendant's equity of redemption, and the Sheriff was directed to pay the proceeds to the judgment creditor. That case for the first time in this country established the principle that an Equity of Redemption was such an interest in the land remaining in the mortgagor as was liable to seizure under execution. Now every interest whatever, which the debtor had or could acquire in the land during the existence of a judgment, became bound by it, and where the Sheriff converted any part of that interest into money, it became payable to the first judgment creditor, other-

wise such sale would be the means of depriving such judgment creditor of the benefit of his lien quoad this interest. It is true this interest did not arise so as to become separable till the mortgage was executed, but as soon as it did arise, if it was worth any thing, it inured to the benefit of the eldest judgment, in the same manner as subsequent improvements of the land would have done. I am aware of the speculative difficulties which this construction, founded on the case of the City Sheriff, may give rise to, but I can arrive at no other conclusion than this, for if the Equity of Redemption be an interest in the land, (which we now cannot doubt, as it may be levied on, sold or released,) the lien of the first judgment must act on it.

From this decision *Furman* for Morgan appealed and made the following points: 1st, That by the decision ex parte the City Sheriff, 1st M'Cord, 399, it was evident that the only interest levied upon by the Sheriff was the Equity of Redemption, remaining in the defendant, Naser, after execution of the mortgage to Stent, and consequently the purchaser at his sale only became entitled to that interest, and took the property subject to the mortgage and all liens prior to it.

2d. That under Morgan's execution the Sheriff could not sell more than that execution bound; that this sale did not affect judgments prior to the mortgage in any respect but only transferred the right remaining in the defendant, Naser, after executing the mortgage, and that whatever a purchaser thought that was worth, and would give for it, the plaintiff, Morgan, was entitled to.

3d. That the judgments prior to the mortgage had still their original lien upon the property, and it might still be sold by them, and it was unreasonable that they should receive this fund and still have the whole property subject to their liens.

4th. That the effect of the decision of the Recorder was to oust the plaintiff, Morgan, while it conferred no real advantage upon the prior judgments, who might notwithstanding this sale by the Sheriff, at any time realize the amounts of their liens upon the property; but the Plaintiff, Morgan, was precluded from acting, though the property was sufficient for the satisfaction of his claim also.

5th. That though it was the general rule that the oldest judgment and execution takes the fund, yet the present case formed an exception. The property being sold subject to the mortgage was necessarily sold subject to the judgments that were prior to it also, and the purchaser only gave for it the amount it was worth over and above all those liens, that being the interest bound by Morgan's execution.

6th. That the judgment creditors prior to the mortgage were entire strangers as to the proceeds of this sale made by the Sheriff. That the only parties concerned in it were the defendant, Naser, whose Equity of Redemption has been transferred out of him by the sale, to the purchaser, who for the amount bid by him at the sale, was invested with the right then possessed by Naser, and by paying off the prior incumbrances, might take the whole estate, and the plaintiff, Morgan, who was entitled to receive the amount the property was found to be worth over and above the prior incumbrances, and which was ascertained by the sale.

Eckhard, contra.

Norr, J. The appeal in this case has been brought upon six different grounds, all of which may be resolved into the single question, to whom does the money in the Sheriff's hands belong. Connected with that question, various views have been taken of the case which it is necessary to consider. A mortgage according to the En-

glish law, is a conveyance of land as a security for money to be paid in future, and defeasable upon the payment of the money within the time prescribed. If the money be not paid according to the contract, the deed becomes absolute, and the fee of the land is vested in the mortgagee. In Equity, however, it is considered in the nature of a pledge, and a Court of Equity will interpose its authority and extend to the mortgagor further time to redeem, although his remedy is lost at law. That is what is called an Equity of Redemption, and I take it to be a well settled rule of law, that a mere equity is not the subject of a levy and sale under an execution. A *fi. fa.* can operate only on a legal estate, and it is confounding all legal distinctions to say, that an execution can be levied on an Equity of Redemption. It is said that in Massachusetts, Connecticut and New York, an Equity of Redemption may be levied on and sold under a *fi. fa.* from a Court of Law. I have not looked into those cases, because the question is quite unimportant as it regards the case now under consideration. For our act of 1791 expressly provides that the fee shall still continue in the mortgagor, and that the mortgage shall be considered only as a pledge for the security of the money, and the mortgagor is entitled to redeem even after the time stipulated by the parties for redemption is past. It is true that the act of 1797 does call this in conformity with the language of the English books, an Equity of Redemption, but it is clearly a misnomer. The right to redeem is unquestionably a legal and not an equitable right. The mortgagor has the legal estate, because it is so expressly declared by the act. He has a legal right to redeem because that is as expressly given. It is a legal and not an equitable right, because it is so given, and because the aid of the Court of Equity is not necessary to the exercise of it. But I am not disposed to dispute about words, so we can

all understand them in the same sense ; for by whatever name it is called the effect of a levy and sale by execution must be the same. Ordinarily, it is the interest of the mortgagor alone that is levied on, and that interest, whatever it may be, is transferred to the purchaser. He takes the place of the mortgagor with all his rights, privileges and disabilities ; that is to say, he takes the land subject to the incumbrance with the right to redeem, and that was the case of the City Sheriff, 1st. M'Cord, 399. The circumstances of that case were as follows :—The land had been mortgaged to Colonel Sass. It was sold under an execution obtained subsequent to the mortgage and bought by him. It was held, in the language of the Court, that he had purchased the Equity of Redemption only, or as I understand the decision, he purchased the legal estate subject to his own mortgage, by which the mortgage was extinguished. If it had been purchased by any other person, the purchaser would have had the right to redeem, and if he had neglected to do so, the mortgagee might foreclose his right by a sale of the premises. There is, however, one exception to this rule : If the land be sold under an execution older than the mortgage, I presume the purchaser would take it discharged of the mortgage. Indeed, connected with this subject, it appears to me that there are four distinct classes of cases ; 1st. Where there are several executions of various dates without any other lien or incumbrance on the land. 2nd. Where there is an execution with a subsequent mortgage or incumbrance. 3rd. Where there is a mortgage only with a subsequent execution ; and, 4th. Where there is an execution, a mortgage and subsequent execution, each bearing date in the order mentioned, which is the case now under consideration. In the first case, our decisions have been, that judgments and executions preserve their liens (it would appear to me) for

any indefinite period of time ; and, therefore, if land be sold under a junior execution, the purchaser acquires a good title and the money must be paid to the several creditors according to the priority of those liens. The execution is considered as a mere authority to sell without regard to the distribution of the fund afterwards. I have not myself been friendly to those decisions which go to support a perpetual lien of a dormant execution, and have uniformly resisted the doctrine in every shape in which it has been presented, and I believe that it is peculiar to this State ; but it is too well established now by a series of decisions to be controverted.

In the second class of cases, the judgment and execution creditors cannot be effected by the mortgage, because, having a prior lien, the purchaser under the execution, as has already been remarked, takes the property discharged from the mortgage, and a purchaser under the mortgage, must take it subsequent to the elder liens.

In the third, we have also seen that the purchaser takes the property subject to the incumbrance, or if it is a more palatable expression, he purchases only the Equity of Redemption.

The last, and the only case in which there appears to be any difficulty, is the case now before us. The difficulty which has arisen in this case is owing, perhaps, partly to the decisions of our Courts, and partly to the act of the Legislature, by which legal and equitable rights are so blended together, that it is difficult to determine to which jurisdiction they most properly belong. In order to see the operation of these conflicting claims or liens, it is only necessary to look to the effect of the various motions arising out of this case. Suppose the land in question to be worth two thousand dollars, and to be mortgaged to secure a debt of one thousand.—If a purchaser under a junior execution bid one thousand

dollars, he must pay that sum to the sheriff, and is still liable to pay one thousand more to redeem the land from the mortgage. If the younger execution creditor is entitled to the purchase money, and the elder executions still retain their liens, then the purchaser has acquired nothing. He loses both his money and the land. If the elder execution creditors are entitled to the money, and still to retain their lien, then the purchaser gets nothing; for they not only hold the money, but may still proceed to sell the land. If the purchaser may hold the land against the elder creditors, and they are entitled only to the purchase money, then the mortgagee holds the land as a security for his debt against the elder liens and they receive only one half of what they are entitled to. From these different views, it is apparent that in a case circumstanced like this, justice can never be done in this summary way by a rule upon the sheriff. Indeed, it appears to me very doubtful whether a Court of Law can in any way administer the relief which such a case requires. A Court of Equity, by bringing all the parties before it, can adjust their respective claims, and distribute to each his due in a more ample manner than can be done by any other method, and is, in my opinion, the only competent tribunal to effect the object. I am of opinion, therefore, that the decision of the Court below should be reversed, and that the rule should be dismissed, and that the parties should be left to litigate their rights by suit, either in law or equity, as they may be advised.

Judgment reversed.

FISHER & WARNER, ex'rs of Warner vs. CONDY & RAGUET.

After a case has been three years on the issue docket, the defendant will not be permitted to withdraw the general issue to plead *ne unques executor*.

If an executor makes profert in his declaration, and the defendant pleads to the action, he admits the plaintiff to be properly in Court. The letters are then taken out of Court, and the defendant cannot call for them again.

This was an action on a bill of exchange brought by the plaintiffs against the defendant, as executors of Warner. The defendant pleaded the general issue, and upon that plea the case was docketed, and stood for trial three years upon the issue docket, but had been continued. Now the defendants moved before Mr. Justice Bay, at Chambers, for leave to withdraw the plea of the general issue, and to plead *ne unques executor*, alledging that they had only lately discovered that the plaintiff's testator had died in another State; and that his will had been proved in this State.

His Honor Judge BAY granted the motion, and
Gadsden, for the plaintiffs, appealed.

Hunt, contra.

NORR, J. I think that a Judge ought to be allowed to exercise a very liberal discretion in moulding the proceedings of Court into such shape as is best calculated to promote the ends of justice; but nothing is better calculated to attain that object than an adherence to the settled forms of law, and the regular order of pleading; and to suffer a person, after a cause has been three years at issue, to withdraw a plea to the merits, and put in a delatory plea, is calculated only to effect delay, and is unauthorized by any law or practice of our Courts. The ground taken by the Judge below, that "the defendants had only lately discovered that the executors had not proved the will, and qualified in this State," cannot be supposed to exist; for when an executor files his declara-

tion, he is required to make a profert of his letters testamentary, and if he fail to do so, it is a good cause of special demurrer. If he makes a profert in his declaration, and the defendant pleads to the action, he admits the plaintiff to be properly in Court. The letters are then taken out of Court, and the defendant cannot call for them again. The defendant, therefore, always has it in his power, without going out of Court, to ascertain whether the plaintiff is actually clothed with the character which he assumes or not. And the plaintiff is never required to prove what the defendant by his pleading admits. The defendant cannot be permitted to say that he has only lately discovered what he might have ascertained by merely looking into the declaration before he put in his plea. The decision of the Judge below, must, therefore, be reversed, and the case must be sent down again to be tried upon its merits. It is satisfactory, nevertheless, to have evidence before us that the plaintiff is really entitled to maintain his action, and that the defendant does not suffer by his own neglect. The motion is granted.

Order set aside.

HARRIET BROWN VS. JOHN DUNCAN.

The mere transitory seizen of a husband of land for the purpose of re-conveying by way of mortgage, will not entitle the wife to dower; and if the deed of conveyance and mortgage are simultaneous, the widow can only be entitled to dower subject to the mortgage, or to her dower out of the surplus over and above that incumbrance.

The value of the land at the time of alienation must be taken as the basis of calculation.

The Commissioners ought to assign the dower in the land itself, and not assess a sum of money in lieu thereof; but by the act of Assembly, they are made the judges of the question, and if they assess a sum of money, unless it is apparent that they have committed some error, their decision must be final.

The Court refused to set aside their return where they assessed a sum of money, stating that the dower could not be set off by metes and bounds without great injury to all the parties concerned.

It is doubtful if the Court can enquire into the reasons of their decision.

They are required to go on the premises to enable them the better to judge of the matter.

This was a suit for the recovery of dower in a tract of marsh land, lying at the upper end of Broad-street, in the City of Charleston; purchased in August, 1817, by Joshua Brown from the City Council of Charleston, and mortgaged by him to them, for the payment of a large proportion of the purchase money. The Council omitted to record their mortgage, and in April, 1818, Brown gave a second mortgage to Jacob R. Valk, which was recorded on the 5th of May following. In the fall of 1818, Brown failed and assigned all his property. John Duncan filed his Bill in Equity against Jacob R. Valk, Patrick Duncan, Joshua Brown, Myer Moses, and the assignees of Brown. All the defendants answered the Bill. He claimed to set up a parol agreement by Brown, to mortgage the property then called Brown's Mill Establishment to him in preference to the mortgage to Valk, on the ground that Valk had notice of the agreement. The City Council also filed their bill against Valk to have their mortgage preferred to his, on the ground of notice of it to him. Valk an-

swered and denied notice. The late Circuit and Appeal Courts of Equity took up both bills and answers as one case, and decreed on them. The bills, answers, and decrees of the Chancellor and Appeal Court were produced in evidence. The decree of the Appeal Court, so far as effects the present case, ordered the property to be sold, and the first proceeds applied to pay Valk's mortgage, and the balance to the Council, to the extent of their debt. The property was sold subject, as appeared by the evidence of the Commissioner in Equity, to a contingent claim of dower, and after discharging the mortgage of Valk, a balance of nine thousand five hundred and seventy-two dollars in the bond of the purchaser, John Duncan, was paid over to the City Council, who on the application of Brown, then discharged him from the balance of the debt. On these facts, the case was submitted to the Court and Jury. The counsel for the demandant contended that she was entitled to her dower in the premises, and the counsel for the defendant, that she was not entitled to her dower in an Equity of Redemption, which was all that was in Brown under his mortgage to the City Council. The arguments had closed, and the Court was charging the Jury, when the counsel for the demandant stated that the demandant considered the purchase from, and the mortgage to the City Council, as two distinct transactions, and called the attention of the Court to the date of the conveyance of the 1st, and the date of the mortgage of the 13th, and that, therefore, she was entitled to her dower, in the whole lands. The counsel for the defendant insisted that until that moment, both the purchase and mortgage had been treated by all parties as one transaction, and that evidence could be immediately produced to prove this allegation.

RICHARDSON, J. who tried the case, charged the Jury that the widow was entitled to dower in whatever re-

maintained after payment of the mortgage*. What that would amount to was not then a question for adjudication; but that the only question for them was, whether the husband had been seized. And under the case made by the pleading without prejudice to the rights of either party, or to the evidence that might be produced as to the extent of the dower, the Court directed the Jury to find the demandant entitled to dower in the lands.

The defendant now moved for a new trial on the grounds:—

1st. That a wife was not entitled to dower in an Equity of Redemption.

2nd. That if the plaintiff in this case was entitled to her dower in the Equity of Redemption, it must be subject to the mortgage, and the Jury on the pleadings ought to have been directed so to find.

3rd. That after the evidence was closed on both sides, and the case had gone to the Court and Jury, a new point was made by the plaintiff, which was supposed to have been conceded to the defendant, and which he was furnished with evidence to disprove.

Before these points were argued in the Court of Appeals, the Commissioners made their return, which was confirmed by the Court, and the additional grounds of appeal were taken, viz:

1st. That the Commissioners should have set off a part of the land for the demandant's dower, by metes and bounds, and not have assessed money in lieu of land.

2nd. That in the assessment of the value of the premises in question, the sum paid by the defendant to the City Council, to wit: \$8000 and upwards on the original purchase money of the premises, should have been deducted from the sum of \$30,000 fixed by the Commissioners as the value; and that a proportional abatement in the assessment of dower should have been made.

King, for the motion. By the common law the mortgagee stands in the relation of trustee, and therefore she is not endowable of an equity unless she redeem. 2 Cruise. Tit. Mort. Chap. 15; 1 Bro. C. C. 326; 1 Cruise. 466, Tit. Trust. 12, ch. 2, p. 12. Attorney-General vs. Scott, Cases Tem. Talbot.

In the case of *Bogy vs. Rutledge*, 1 Bay.—the rule laid down is, that the wife is not endowable in lands purchased by the husband, and at the same time mortgaged for the purchase money, unless it is redeemed.—Under this rule she is only entitled to dower in what remains after paying the mortgage to the Council. The Court ought to controul the Commissioners in the capricious assessment of money in lieu of land. It is apparent that it will operate unequally and unjustly in this case. The whole fee simple will not in all probability sell for more than the sum assessed, perhaps not so much. The objection that a partition of the mill pond would be destructive of the value of the whole, will apply even with more force to the defendant, and it does not lie with the demandant to say, that she will not accept a part of the soil because it will injure the defendant.

Petigru, Attorney-General contra. Dower is favored in law. In the case of *Bogy vs. Rutledge*, the mortgage was executed at a time when the mortgagee was by law the legal owner of the estate, and there the deeds were contemporaneous.

So in the case of *Crafts*: There the conveyance and mortgage was before the marriage, and the husband was not seized except sub modo during the coverture, and therefore the wife could not be endowed.

The cases cited are instances in which the husband was only seized in the instant, and yet the wife was entitled to dower. 2 Bacon, 372; Cro. Eliz. 802; Cro. Car. 190. The rule in law and equity is the same. In equity the seller has a

lien for the purchase money ; but no case can be found in which the wife has in such case been deprived of dower.

Dower is so much favored, that the wife of a mortgagor before marriage, is entitled to dower against all but the mortgagee. 1 Day, 559, Fish vs. Fish. So although the husband was never seized of any thing except the equity of redemption, as when the husband inherited the equity. 15 Mass. 278, Snow vs. Tuttle; 13th Mass. 227, Bottom vs. Ballard. 15 Johnson, 319; 1 Johns. C. C. 45, Tavel vs. Tavel; 5th do. 452, Titus vs. Nelson. Harrington vs. Hitchcock, 6 Johnson, 290. Admitting that the sale in this case was made under an agreement to mortgage; the question then is, whether the wife is barred by an agreement to mortgage, and there is no case, book, or record in which a precedent for it can be found:—Collins vs. Terry, 7 Johns, 217. According to the rule laid down in this case, the wife was entitled to be endowed of the value at the time of alienation. Duncan gave \$41,000, and according to that rule she was entitled to be endowed of the third of that sum. The act confines her dower to the value at the time of alienation, and it must work both ways, whether the value be improved or diminished. 2 Const. Rep. 254, Russell vs. Gee; Acts of ass. 1824.

King, in reply. It will be found by reference to the cases quoted, that none of the persons resisting the claim of dower claimed under the mortgagee, all of them seem to save his rights. Defendant claims under the City Council the mortgagee.

CURIA per NOTT, J. This is an application to this Court to reverse an order of the Court below affirming the return of Commissioners assessing the sum of five thousand dollars for the dower of the demandant in the lands in question. The principal ground relied on by the appellant, is, that the deed from the City Council to Jonathan

Brown, and the mortgage by him to the City Council, were simultaneous acts, and, therefore the momentary seizin of Brown merely for the purpose of reconveying the same back by way of mortgage in order to secure the purchase money was not such a seizin as would entitle his widow to dower, and that although the dates of the two deeds are different, yet that the delivery of both was contemporaneous and that the advantage taken after the testimony was closed, of the difference in the dates, was a surprise upon the party and an objection which the defendant could have removed, if he had been apprised that such a ground would have been relied on. I consider it a very well settled rule, both in Law and Equity, that a mere transitory seizin of a husband of a tract of land for the purpose of reconveying by way of Mortgage, would not at common law entitle the wife to dower. A mortgage at common law was a conveyance of land subject to defeasance upon the payment of the money which it was intended to secure, and as the fee vested in the mortgagee, there was nothing left in the husband of which the wife could be endowed. It is, however, otherwise in this State. The mortgagor retains the legal estate, and the mortgage is only considered as a pledge for the security of the money. But it was held in the case of *Mrs. Crafts vs. the Ex'ors of Crafts*, 2nd M'Cord, 54, that although the husband still retained the legal estate, yet that the mortgagee having obtained a vested lien before marriage, his security could not be varied or diminished by any after act of the mortgagor, and that although the wife was entitled to dower, it must be subject to the prior incumbrance. I think that the same principle will apply in this case. If the two deeds were simultaneous, the widow can only be entitled to dower subject to the mortgage to the City Council, or of the surplus over and above that incumbrance. If, therefore, the

Court could see that the defendant had sustained any injury, or rather, if we did not see that no injustice has been done by the sum assessed, a new trial might, perhaps, have been granted on the ground of surprise. But it will be seen by looking through the whole case, that the amount ultimately found due to the City Council was about eight thousand dollars. That the land was sold to the defendant for forty thousand dollars; so that the sum of which the widow was entitled to be endowed, was thirty two thousand dollars. The act of the Legislature of 1824, declares that the value of the land at the time of alienation shall be taken as the basis of calculation. The sum of forty thousand dollars was not only the sum for which the land was sold, but it was sold subject to the claim of dower, and that was the sum at which it was valued by the commissioners by whom the dower was assessed. But they considered the property as having deteriorated in value, so that at the death of Brown, it was worth only thirty thousand dollars, and they took that sum as the predicate of their assessment. In that respect the Commissioners did wrong, as the act expressly requires that the dower shall be assessed according to the value of the land at the time of alienation, and not at the time of the death of the husband; and although that rule may perhaps, sometimes operate oppressively, yet I do not know that as a general rule, a better one could be adopted. But whether correct or not, it is one established by the Legislature, and must, therefore, be the rule of decision for this Court. The sum, therefore, out of which the dower has been assessed is less than the value of the land at the time of alienation, after deducting the sum due the City Council. It is less than the amount to which the widow would be entitled upon the principle contended for by the defendant himself. Admitting, therefore, that the facts exist on which the defendant

relies, they furnish no ground for a new trial on his part. Another ground relied on is that the Commissioners ought to have assigned the dower in the land itself and were not authorized to assess a sum of money in lieu thereof, without the consent of the defendant. It is apparent that injustice must sometimes be done by this method of proceeding. I recollect a case where the sum raised by the sale of the whole tract of land in fee simple was not sufficient to satisfy the amount assessed for the dower. But the act is express on the subject. The Commissioners are made the judges of the question, and unless it is apparent that they have committed some error, their decision must be final and conclusive. But there does not appear to be any error in this case. The Commissioners have returned that "on consideration of the state of the premises, we are of opinion that the demandant's dower cannot be set off by metes and bounds, without great injury to all the parties concerned." It is, at least, doubtful whether the Court can enquire into the reasons on which these opinions are founded. They are required to go on the premises to enable them the better to judge of the matter from their own view, and even if we are authorized to reverse their proceedings, I do not discover any evidence which made it the duty of the Commissioners to come to a different conclusion. I am of the opinion, therefore, that the motion ought to be refused.

New trial refused.

HEYWARD VS. CUTHBERT.

An information before a Magistrate does not constitute such a commencement of a prosecution, as to enable the person informed against to maintain an action for malicious prosecution.

The foundation of such an action is the wrong done to the person; and if he is not detained or imprisoned, the action cannot be maintained. The party must have been put in such a situation as to have it in his power to compel the State to proceed, or to discharge him.

Nor is the entry of *nol. pros.* by the Solicitor on the information, such a termination of the matter as would support an action, if the prosecution had been commenced.

If the information constitutes a libel, the party informed against must pursue his remedy as for a libel, (and not bring an action on the case,) and in such a case, though it be a judicial proceeding, yet if it be shewn that it was merely resorted to, to gratify private malignity, and to be false, the action for a libel may be maintained.

The defendant went before a magistrate, and made an information in the form of an affidavit drawn up by himself, in which he charged the plaintiff with a felony in stealing a negro slave. There was no legal evidence that a warrant was ever issued on this information, but the magistrate returned it, with some other papers connected with the same transaction, to the Clerk's office, and they were by him turned over to the Solicitor of the circuit. On the envelope covering these papers, he made an endorsement expressive of his opinion that the supposed felony was only a trespass, and superadded the words "*nol. pros.*" and no further proceedings were ever had on them. The two first counts in the declaration were in the usual form for a malicious prosecution, and charged the making of the information as the commencement, and the *nol. pros.* by the Solicitor as the termination of the prosecution. The third and last count stated the facts substantially as they occurred. This was a motion to set aside the non-suit, ordered on the circuit, and the following points were made:

1st. Whether the counts for malicious prosecution were supported by the evidence.

2dly. Whether the case stated in the third and last count, and proved by the evidence was a sufficient foundation for an action on the case.

Petigru & Dawson, for the motion.

Frost & Hunt, contra.

CURIA *per* JOHNSON, J. It will not be necessary to decide here whether an information before a magistrate may, or may not, for some purposes be regarded as the commencement of a prosecution; for whether we consider the literal import of the term malicious prosecution, or the nature of the injury which the action so called was framed to redress, it cannot be regarded as the commencement of a prosecution. The terms themselves presuppose some proceeding against the party complaining, but the information is no more than a statement of facts from which the magistrate before whom it is made is called on to determine whether in law they authorize a criminal prosecution, and to which the accused is not a party. There was then in this case no prosecution.—The foundation of this sort of action is the wrong done to the plaintiff by the direct detention or imprisonment of his person. The wound inflicted on his reputation and money that he may have expended on his defence are more matters of aggravation than of substance, as will be seen by a reference to the precedents. The same conclusion follows from the rules of evidence peculiar to this action. The necessity of proving the termination of the prosecution, in some way or other, is admitted on all hands for the obvious reason that it would be inconsistent to allow a plaintiff to recover when in the end, he might be convicted of the offence charged against him; and this is impracticable when there has been no prosecution. A correct criterion by which to determine whether a prosecution has or has not been commenced, will perhaps be best formed by inquiring whether the proceedings are in

such a situation as to put it in the power of the party prosecuted to compel the State to proceed, or to procure his own discharge, which can never happen until he is a party to them. If, for instance, he has been arrested and brought before a magistrate, and there is not sufficient evidence of the accusation against him, it is his privilege to ask, and the duty of the magistrate to discharge him; or if he has entered into recognizance, or been committed, and the State refuses or neglects to proceed, or abandons the prosecution, he is entitled to be discharged; but if the magistrate thinks proper to put a criminal information into his pocket, the party accused has no power over him, nor has he any means of compelling him to proceed or abandon the prosecution. As a prosecution, therefore, it could not have a termination, because it never had a legal commencement. Admitting, however, that the information in this case could be regarded as the commencement of a prosecution, there is no evidence of a legal termination, and for that reason, this, as an action for a malicious prosecution, must fail; for in the case of *Smith vs. Shackelford*, 1 Nott, and M'Cord 73, the Court held that an indorsement by a Solicitor corresponding in every thing material with that made in this case, was not such an end of the proceedings as would support the action.

The argument places the second proposition on the broad ground, that the fact stated in the third count constitute an injury for which the law ought to furnish a remedy, and in the absence of any prescribed form that must be adopted which is suggested by the nature of the case: and I agree with Mr. Justice Buller, that every special action on the case is a new action, and that it is no objection to it that one of the same sort has never before been brought—Buller N. P. 78. But this must be understood with its proper limitations; for there is a class of injuries which are aptly enough denominated

damnum absque injuria, and for which an action will not lie, and, I think, it may be well doubted whether this is not one of that class. The counsel have relied on the case of *Thom vs. Blanchard*, 5th Johnson Rep. 508, to show that an action for a libel will not lie for any thing done in the course of a judicial proceeding, and hence it is concluded that the plaintiff is without remedy unless it is furnished by the form of action adopted by him; and the case of *Cutler vs. Dixon*, 2 Co. Rep. 290, goes so far as to decide that no action shall lie for any matter arising in the ordinary course of justice; and the reason given, is that if actions were permitted in such cases, those who have a just cause of complaint would not dare to complain for fear of infinite vexation. This opinion seems to have been sustained by the whole current of decisions which are collected in a note in Thomas' Edition of that Work. These cases overshoot the mark aimed at, for the reasoning on which they are founded apply to all the forms of action alike, and proceed on the principle that it is against public policy to allow them. But I am much inclined to think with Seargent Hawkins, that if one resort to a judicial proceeding as a mere cover to gratify private malignity, and these facts can be clearly shown, it is rather an aggravation of the injury; and the opinion of the Chancellor in the case of *Thom vs. Blanchard*, would seem to favour this conclusion when the falsity of the charge and the malicious motive can be clearly proved by evidence aliunde. But it is unnecessary to decide this matter here, as in any view of the question, the plaintiff cannot prevail in this motion. It is a settled rule of practice, that when a usage has prescribed a particular form of action for a certain class of injuries, it must be pursued. In this case the wrong complained of is the publishing a paper writing containing a criminal charge against the plaintiff, and if any action would lie, that)

which the practice of the Court has appropriated to such an injury ought to have been resorted to. But there is yet a more conclusive objection. There is no proof of malice except that arising from the publication, and that having been made in the course of a judicial proceeding repels the presumption and throws the onus of proof on the plaintiff. The motion in this case must, therefore, be refused. *Nonsuit confirmed.*

THE STATE VS. WRIGHT.

A Slave can commit a felony.

By statute of William and Mary, receivers of stolen goods are made accessaries after the fact. Since which statute no indictment as for a misdemeanour at common law can be maintained.

So, the receiver of stolen goods from a slave cannot be indicted for a misdemeanour, (except under the statute, 1 Ann c. 9,) but under the statute he may be indicted as an accessary, and the record of conviction of the slave may be given in evidence.

Quere—In what manner is it to be ascertained on the trial, that the slave was convicted of grand or petit larceny?

This was an indictment for receiving stolen goods.—The indictment contained two counts, one for a misdemeanour at common law, and the other for a misdemeanour under the statute 1st. Ann. c. 9. The case was tried before Mr. Justice HUGER, in Charleston, May term, 1827, who made the following report: "The defendant was indicted for having received a stolen ring from a negro. The ring was stated in the indictment to be the property of Eliza M. Ross. The indictment contained two or more counts. One was for a misdemeanour at common law; and a question arose whether the common law count could be sustained. The Statute of William and Mary declares the receiver of stolen goods an accessary after the fact, and a felon. When a misdemeanour at common law is made felony by statute, the first is merged in the last; Raymond 711. It was, therefore, contended

that this count must be stricken out. I was of a different opinion. I did not regard the statute of William and Mary as embracing the receiver of stolen goods from a slave. It includes only such as have received stolen goods from one who is capable of committing a felony.—By our act, a slave is not regarded as capable of committing a felony. The common law offence, in this respect, has, therefore, not been merged.”

The prisoner was convicted and this was a motion in arrest of judgment on the grounds, that if the defendant was guilty of any offence, he was liable as accessory, and could not, therefore, be indicted for a misdemeanour, or at common law, and that the principal was known and could have been prosecuted, and therefore the defendant could not be indicted under the statute of Ann.

Yeadon, for the motion, cited 2 Brev. Dig. 180, 181, in note. *State vs. Council, Harper*, L. R. 53. If the principal is unknown it is sufficient so to state it, but if he is known he must be prosecuted; 3 Chitty Cr. L. 721. It is admitted that in general the offence at common law of receiving is merged by the statute, but it is said that slaves are incapable of committing a felony. The act of 1740, 2 Brev. 232, 233, declares slaves capable of a felony. With regard to names of third persons, they ought to be described so as not to mistake them for others. The names of Eliza and Elizabeth are distinct. 1 Chit. 177.

Petigru, attorney-general, contra. Admitting that the statute does repeal the common law with respect to white persons, it will not be so construed with regard to slaves, as it will not furnish a remedy. The mode of trial, of evidence, and conviction are different with respect to slaves. The declarations of slaves without oath are admissible. The judgment does not define the degree of the offence, and the punishment is discretionary. The admission of a conviction founded on such

evidence against a white man is inadmissible. The reason why the receiver cannot at common law be convicted before the principal, is that it might so happen that the principal might be innocent, and to try the receiver before the principal, would be to try a matter without the proper parties. The judgment of the Court in the case of the principal being a slave, does not distinguish between grand and petit larceny and this is a difficulty which it is impossible to get over—ascertaining the degree of offence is one of the reasons that renders the trial of the principal necessary.

Elliott, in reply, cited Chitty 1713; 2 Lord Ray. 1730; 1 Leach 181, Wilks' case. If the principal is known the receiver cannot be tried until his conviction. 5 T. R. 83; 1 Haile 624.

CURIA, *per* NORT, J. At common law the receivers of stolen goods knowing them to have been stolen, were guilty only of a misdemeanour; 3 Chitty, C. L. 713. By the statute 4th and 5th, William and Mary, c. 9, it is enacted that such persons, "shall be taken and deemed accessories after the fact, and shall incur the penalties which attach to offences in that degree." Since that statute, it has been held that no indictment as for a misdemeanour at common law, can be supported; 3d Chitty, Crim. L. 713; 1st Ld. Raymond, 711. But it is contended that the Statute of William and Mary does not relate to receivers of goods from a slave—that it embraces only those who have received stolen goods from one who is capable of committing a felony, and that by our act a slave is not regarded as capable of committing a felony. If that position be correct, perhaps the conclusion will follow. The idea is a new one to me, and it is, therefore, the first time that I have had occasion to consider the question. But I have not been able to discover any foundation for such an opinion. Our act considers slaves

as moral agents. It makes them amenable to the law for the commission of crimes; and, it appears to me, that it contemplates them in so many words as capable of committing felonies. The act of 1740, P. L. 167, 2 Brev. 233, provides, that whereas some *crimes* and *offences* of an enormous nature, and the most pernicious consequences may be committed by slaves, &c. Be it, therefore, enacted, that the several *crimes* and *offences* hereinafter particularly enumerated are hereby declared to be *felony* without the benefit of clergy, &c. After enumerating several offences, it further says,—or shall *feloniously* steal, take, or carry away any slave, &c. every such slave, &c. shall suffer death as a *felon*. The act appears to me so plain as to resist all reasoning on the subject. It declares the offences prohibited to be *felonies*. To incur the penalty, it is required that they shall be *feloniously* done; and the offenders are doomed to death “as *felons*.” It appears to me, therefore, that the defendant cannot be indicted for a misdemeanour at common law, and that the first count of the indictment cannot be supported.

The next question is, whether the indictment can be supported under the statute—1st Ann, c. 9. In order to decide that question, it is necessary to observe that in England there is another statute on the same subject, passed in the 5th year of Queen Ann, c. 33, which provides that where the principal felon cannot be taken so as to be prosecuted, &c. the receiver may be indicted as for a misdemeanour. Under these statutes, it has been held that an indictment for a misdemeanour cannot be maintained against the receiver where the principal is known and can be prosecuted, but that he must be indicted as an accessory; Russell on Crimes, 721, 726, Do. 1138, 1303, 1312; East. C. L. 650, 745, 781; Foster's C. L. 374. It is now contended that this construc-

tion of the English statutes arises from the provisions of the two statutes taken together, and that as the statute of 5 Ann is not of force in the State, we must be governed by the first which admits of a different construction. But I am disposed to think, that if we decide the case upon the statute of 1st. Ann alone, we shall come to the same conclusion as the English Judges. The mischief intended to be provided against, was the escape of receivers where the principal was not known or could not be prosecuted. If the principal were known, and could be prosecuted, the mischief did not exist, and, therefore, the remedy did not apply ; and the rule laid down by all the elementary writers, for the construction of statutes, is to look to the evil intended to be removed, and the remedy provided ; and penal statutes ought not to be extended by construction beyond the evil intended to be provided against. But without relying alone on the construction of that statute, the provincial act of assembly of 1769, is so exactly in the words of the statute 5th Ann, that it may almost be considered as a re-enactment of the provisions of that statute, and, I believe, has always been so regarded, so far as relates to the question now under consideration, and that the decisions in this State have been in conformity with those in England on this subject.

But another, and I think a more formidable objection is made :—that a white person cannot be accessary to a crime committed by a slave or person of colour.—But it appears to me that even that objection can not prevail. The principal ground relied on in support of this objection is, that the record of the conviction of a slave cannot be given in evidence on the trial of the accessary ; for if the conviction should happen to be founded upon testimony which, though competent to convict a slave, should not be competent against a white person, the record could not be higher evidence than

that upon which it is founded, and then could not be received. But the evidence of the conviction of the principal, is not conceived as evidence of the guilt of the accessory, but merely to shew that the principal has been convicted for the purpose of avoiding the absurdity of convicting the accessory of a crime of which the person accused as principal may be acquitted. I do not, therefore, feel any difficulty on that score; and if I did, I should be of opinion that it belonged to the legislature to provide a remedy, and not to this Court. And it would even be better that receivers of stolen goods should never be punished, than that such a doctrine should be established.—Let it once be understood that a white person cannot be an accessory to a person of colour, (for the principle is the same by our law, whether applied to bond or free,) and that description of persons may be made the instruments of murder, burglary, arson, and the whole catalogue of the most atrocious crimes, and the real offender escape with impunity. There is, however, one question or which I have not yet been able to satisfy my mind.—That is, in what manner it is to be ascertained on the trial of the accessory, whether the principal had been guilty of grand or petit larceny. That fact does not appear from the form of the record of conviction usually made out in such cases. Whether that will be an insurmountable difficulty, is a question on which I am not yet prepared to express an opinion. But if it should ultimately turn out so, I do not think it would justify the Court in passing a law, to provide for the case. It is undoubtedly a subject worthy the attention of the legislature, and I hope will not escape the notice of that body. In any view which I have been able to take of the question, I am of opinion that the judgment must be arrested.

Judgment arrested.

BROWN & OVERSTREET VS. ELIAS WALLEN, Indorser.

The defendant took the benefit of the Insolvent Debtors Law of Georgia, and among his creditors, residing in that State, and for whose benefit the assessment was made, was a mercantile house to which the plaintiffs were members. The note sued on was for a debt due before the assignment. Upon suit being brought against the defendant in South Carolina on the note, held that as both plaintiffs and defendant were citizens of Georgia, the discharge in Georgia was conclusive against the plaintiffs in this State.

The defendant, formerly a merchant residing in Georgia in January, 1820, having failed in business, applied for and obtained the benefit of the Insolvent Debtors Act of that State. But having lately occasion to come to Charleston, had been arrested and obliged to give special bail in an action founded on an indorsement on a negotiable note given to Brown, Green & Co. merchants in that State, dated 21st April, 1820, due nine months after date; and from the proceedings in the case before the Court, where the discharge was given, it appeared that Brown, Green & Co. were creditors to the amount of \$1000, or \$1200, and that the note in question had been transferred to them in part payment of this debt, and that their names were mentioned in the assignment as creditors for a dividend of the defendants estate.

Frost, moved for an exoneretur to be entered on the bail piece, and that defendant be discharged from his arrest upon entering common appearance to the action; and he produced a certificate from the Clerk of the Court of Chatham county, in Georgia, under the certificate of one of the Georgia Judges, of the proceedings in that Court, by which it appeared that he was, on 10th July, 1820, duly discharged from his creditors. He read the 2nd clause of the Insolvent Debtors Act, of 1801, of the State of Georgia, which declares that any debtor duly discharged under that act, shall not be again arrested, or impleaded, or held to bail on mesue process for any debt or

contract made or entered into prior to such discharge; and further, that any person bringing such suit knowing the discharge under the act, shall forfeit and pay the sum of \$500. He contended that the defendant was entitled to his discharge under the act of the State of Georgia; that this act was part of the *lex loci* of that State, and ought to be respected here.

Elfe, against the motion, urged that as the defendant was duly arrested for a debt due on an indorsed note of hand, and held to bail upon an affidavit of the debt in due form, he was not entitled to his discharge in South Carolina, although the note was made and indorsed in Georgia before his insolvency in Georgia. That although the taking the benefit of the Insolvent Act might operate as a discharge in Georgia, it had no effect in South Carolina. That though the *lex loci*, or the law of Georgia might operate there, it did not bar the remedy here, and the *lex fori* was unimpeached in Carolina, and the proceedings thus far were agreeably to the laws of South Carolina for the recovery of debts; and he relied on 7th Johnson, 117, where it was laid down that a discharge under the Insolvent Act of Connecticut, was no bar to an action in the State of New York—2 John. Rep. 198; 11 Do. 194; 15 Johnson, 467.

Frost, in reply. There was a species of legal warfare between New York and Connecticut, and a great want of courtesy in not giving due respect to the laws and the legal proceedings of each other's Courts of Justice. This courtesy subsisted in all the other States, and due regard was paid to the laws and proceedings of the Courts of Justice in all the States to the laws and proceedings of the others. In 5th Binney, 332, it is laid down that as the laws of Maryland give effect to a discharge of an Insolvent Debtor under the laws of Pennsylvania, so, on the other hand, the Courts of Justice in Pennsylvania

ought to pay due regard to the laws and proceedings in the Courts of Justice in Maryland, and to allow of a similar discharge. The same doctrine was laid down in Dallas 229, 294; 2d Dallas, 100. In like manner a similar curtesy had prevailed between this State and Georgia. The Courts of each have respected, reciprocally, the laws and proceedings of the other, and as the law of Georgia in question has declared that a debtor discharged under the Insolvent Act shall not be again arrested for the same debt under a penalty of \$500, he hoped the defendant in this case would be discharged from his present arrest.

BAY, J. (who heard the motion.) Had no hesitation in granting the motion in favour of defendant, for a variety of reasons.

1st. Because a refusal to respect the acts and proceedings of a sister State would have a tendency to destroy the harmony which so happily subsisted between the great majority of the States in the Union, and would put an end to the faith and credit which, for the good of the whole, was due, and owing to every State in the Union from every other sister State in the confederacy.

2dly. That, even by the law of Nations not confederated together, as we are, the *lex loci* were acknowledged and supported by the curtesy and common consent of Nations; consequently where a citizen of one State is acquitted of an offence, or discharged from an obligation by the laws of one country, he can never be called again to answer, or his release again questioned, by another.

3dly. That, by the Insolvent Debtors Act of Georgia, the debtor is, upon his voluntarily giving up his effects, entitled to his discharge from imprisonment and release from his debts, and any man suing him again is liable to the penalty of \$500.

4thly. That the Courts of Justice in Georgia have always, as far as he understood, respected the Insolvent Laws of South Carolina, and have never called their validity in question.

5thly. That he was of opinion that the cases quoted from Johnson's Reports were at war with the curtesy of the other States of the Union, and the principles of most of the Insolvent Laws; while, on the other hand, it appeared to him that the cases quoted on behalf of the defendant, were in unison with the principles of the law of Nations and the true policy of the different States.

6thly. That, when a creditor voluntarily comes into a Court of Justice seeking redress against his debtor, he consents to be bound by the conditions which are imposed by an Insolvent Law of the State where the debtor takes the benefit of such law, in cases where the debtor is unable to pay the debt—1st. Nott & M'Cord, 494.

7thly. and lastly. Because this had been the uniform construction given to the Insolvent Law of South Carolina since the time our Insolvent Law had been in force to the present day. And, he, therefore, ordered that the defendant be discharged from his present arrest upon his entering common appearance to the suit, and that an *exoneretur* be entered on the bail bond.

The point was now argued again in this Court.

CURIA per Nott J. It appears that this claim arose on the indorsement of the defendant to a mercantile house of the plaintiffs in Savannah; so that the plaintiffs and defendant were all citizens of the same State in which the latter took the benefit of the act. On that ground, we concur with the Judge below, and are of opinion that the motion ought to be refused.

Exoneretur entered.

J. A. WOTTON vs. J. D. PARSONS.

When the Sheriff returns that he has left the copy of a writ at the most usual and notorious place of abode, the defendant may, on a motion to set aside the judgment, prove that it was not his place of abode.

A motion to set aside a judgment on the ground that the original process was left at the wrong place, must be made at the sitting of the Circuit Court; but a Judge at Chambers may suspend an execution until the Court sits.

This was an application to Judge Bay, at Chambers, to open a judgment in this case. The defendant submitted an affidavit stating that he owed the plaintiff nothing, and never did owe him the value of one cent—that he had not received nor seen the copy process in this case, and, therefore, had no notice to appear in Court. The Judge thought the affidavit insufficient, and refused the motion. After the Judge had so decided, the defendant for the first time learned that the copy process had been left at No. 55 Queen-street, Charleston, where defendant formerly resided, and from which place he removed, five months prior to the issuing of the process; that upon applying to the deputy Sheriff, to ascertain the fact, he was informed by him that he did leave the process in Queen-street, No. 55, believing that defendant resided there. The defendant then made an affidavit of this additional fact. His attorney also made an affidavit that the deputy Sheriff had stated the same thing to him, and produced an affidavit made by Francis Harrison, showing that defendant did not reside in Queen-street, No. 55, where the copy process was left, but had removed from there in December, 1826.

The Judge refused to hear the affidavits, on the ground that the case had already been decided.

The defendant appealed, on the ground that the affidavits ought to have been received, as they stated a fact, which did not and could not have come within the know-

ledge of the defendant, upon the first application, and which would have been a sufficient ground then, and was, still, a sufficient ground to open the judgment and allow the defendant a hearing on the merits of the case.

Gadsden, for the motion.

Trescot & M'Cready, contra.

CURIA per NOTT, J. I doubt very much whether the Judge, at Chambers, ought to have granted this motion.—The investigation might have required a resort to measures which a Judge at Chambers, would have found it difficult to enforce. But he might have ordered the execution to be stayed until the sitting of the Court, where the matter might have been investigated. The question, therefore, now is, whether the circumstances of the case are such as authorized such a course to be pursued. The ground on which the motion was refused, is stated in the opinion of the Judge to be, “that the service of the process, proved by the oath of the officer serving it, was to be preferred to the oath of the party.” It is true, the oath of the party is not to prevail against the oath of the officer in whom the law has reposed a confidence; but when the return of the Sheriff is ambiguous upon its face, or where it may be rendered so by evidence aliunde, then the oath of the party is sufficient to require the officer so to amend his return as to remove the ambiguity and to present the truth to the view of the Court. In this case, the Sheriff returns that he left a copy of the process at the most usual and notorious place of abode of the defendant. But the Sheriff is not the exclusive judge of the usual and most notorious place of abode of the party. It is a fact in which he may very well be mistaken, and one which may be usually proved by other evidence than that of the party. Whenever, therefore, reasonable cause is shewn to authorize the belief that he may have been mistaken, he ought to be required to amend his return, so as to point

out the place where the copy process was left, so that the truth of the matter may be ascertained; and in this case, I think, the proof was abundantly sufficient for the purpose. If it should turn out, upon an amendment of a return, that the Sheriff had left the process at a wrong place, the service would be void. If not, the return of the Sheriff must prevail. But it is a question which does not necessarily imply a conflict of evidence. It would be a most alarming state of things, if the oath of a deputy Sheriff were to be conclusive to any amount in such a case, and that the Court should not be competent to enquire into the truth of the fact. It is no answer, to say, that the party may have his action against the Sheriff.— That would be a very inadequate remedy for the injury which he might have sustained. I am of opinion that the Judge should have ordered a stay of the execution until the motion could have been heard. And this Court will now make the order which ought then to have been made. The Judge, before whom the motion is made, may always lay the parties under such terms as are best calculated to effect the justice of the case. It is, therefore, ordered that the execution in this case be suspended until the meeting of the next Court, in Charleston, and until the motion can be heard in that Court.

Execution suspended.

W. B. LEGARE, Ass'e. vs. CHARLES T. BROWN,

A bail bond taken in the Circuit Court of Common Pleas for Charleston District, may be sued upon in the City Court of Charleston.

This was an action on a bail bond taken in the Common Pleas for Charleston District, and assigned to the plaintiff tried before the Recorder in the City Court of Charles-

ton. The defendant moved to quash the writ, on the ground that the bond could be sued upon only in the Court where it was taken and where the original action had been brought. The Recorder overruled the motion for the following reasons.

The RECORDER. I regard the English rule as clear, that the action on the bond should be in the same Court where the bail was given, because the statute of Ann gives the "same Court the power in a summary way to give such relief to the plaintiff, defendant and bail, as is agreeable to justice." This relief can only be given by general rules of practice and these rules differ in the Common Pleas, Palatine Courts and King's Bench. It follows that neither of these Courts could sustain jurisdiction on a bail bond taken in the other, without depriving that other of the benefit of its own rules under the Statute; but I think that where the rules of the Court taking the bond can be enforced by the Court where the suit is brought, the action must be allowed. In the present case, the City Court being a Court of Common Pleas, to a certain extent, (a) will be governed in a matter of bail by the rules of practice of the Common Pleas and this Court will take care that the time allowed the bail by the Common Pleas to surrender his principal shall on such a suit be neither extended nor abridged in consequence of the suit being brought here. A similar course has been pursued by the Supreme Court of New York, in the case of Gardiner, ass'e. vs. Burham, et. alios, 12 Johnson, 459, where, on a bail bond taken in the Common Pleas, they entertained jurisdiction and awarded relief as to costs, &c. in the same manner that it would have been done in the Common Pleas.

(a.) The Court has jurisdiction only of cases involving a claim under a certain amount.

From this decision the defendant appealed on the ground that the bail bond having been taken and the original action having been commenced in the Court of Common Pleas, that tribunal alone could take cognizance of the cause.

Egleston, for the motion.

Yeadon, contra.

CURIA *per* NOTT, J. The Court concur with the Recorder in this case, and the motion, therefore, is refused.
Judgment affirmed.

JOHN BAKER VS. FRANCIS G. DELIESSÉLINE.

The entry of a nonsuit on the back of a Declaration is evidence of the termination of that suit in the Court alone where the nonsuit was ordered. In any other Court, evidence of the record of the judgment must be produced.

In an action against the Sheriff for an escape under mesne process, evidence that the Plaintiff in the original suit, after the escape, suffered a nonsuit, is not conclusive evidence that he has sustained no injury.

After an escape, the Plaintiff may proceed against the Sheriff, immediately, without further prosecuting his suit against the principal; but if he do, and abandons it, or is nonsuited, that nonsuit is not *conclusive* in favour of the Sheriff.

Where a Defendant is in custody on mesne process, and the Plaintiff is nonsuited, the Sheriff may discharge the Defendant.

This was an action on the case against Francis G. Delieesseline, late Sheriff of Charleston district, for an escape—Plaintiff proved the cause of action against Michael Stazinsky, the individual who had escaped from the custody of the Sheriff, after the return of the bail writ. The delivery of the bail process to the Sheriff—the arrest—the petition of the debtor for the benefit of the Prison Bounds Act, accompanied by his schedule—the suggestion of fraud filed on that occasion with the verdict of the jury, finding him guilty on the first suggestion—to wit: that he had in his possession the sum of \$1,500 when he applied to be discharged under the provisions of the

Prison Bounds Act, and his escape, were also given in evidence.

The defendant produced testimony to shew the insolvency of the prisoner, and also introduced in evidence the declaration in the case of John Baker vs. Stazinsky, indorsed on the back, "a nonsuit ordered, 11th June, 1823." This was objected to on the part of the plaintiff: 1st. Because it was not a matter of record, no judgment on the nonsuit having been entered up; and, 2ndly. That admitting the nonsuit had been regularly entered up, it was immaterial to the issue, being subsequent to the escape; the escape having occurred in 1821, and the nonsuit granted in 1823. The nonsuit was permitted to go to the Jury as evidence.

The defendant having closed, the plaintiff offered in reply evidence to shew that the nonsuit was granted in consequence of the plaintiff's (in the case of Baker vs. Stazinsky) failing to prove the hand writing of the indorsers on Stazinsky's notes, although he had proved that the drawer, Stazinsky, had acknowledged the debt to the plaintiff, and promised to pay. Plaintiff also produced evidence to shew that at the time of the nonsuit, there was a detainer against the prisoner in another case, by the same attorney, and that under the conviction of fraud, the prisoner should at that time have been in the custody of the Sheriff, and under the provisions of the Prison Bounds Act, could not be discharged "without fully satisfying the action on which he was confined."

The case was submitted to the Jury, under the charge of his Honour, Judge Huger, the presiding Judge, who charged them that the plaintiff had established his case, so far as it regarded the cause of action against Stazinsky—the delivery of the bail process to the Sheriff—the arrest and the escape—and that the verdict of the Jury on the suggestion of fraud, furnished strong evidence of the sol-

veny of the prisoner ; but that the question of his insolvency was a matter for the consideration of the Jury alone—that the plaintiff's having suffered a nonsuit in the progress of the suit against Stazinsky, had sustained no damage, the nonsuit operating as a discharge of the prisoner—that proof of a motion having been made by the defendant's attorney after the nonsuit was obtained for the discharge of the prisoner was not necessary to authorize the Sheriff to discharge him, and that although the prisoner was in the custody of the Sheriff, under a detainer from the same attorney, and under the conviction of a Jury on a suggestion of fraud, that it was immaterial.

The Jury found for the defendant, and the plaintiff now appealed on the grounds:

1st. That the presiding Judge permitted the defendant to offer in evidence a nonsuit in the case of Baker vs. Stazinsky, although a judgment on the nonsuit had never been entered up, and was not a matter of record.

2nd. That a nonsuit in itself was not evidence of a party being out of Court, and at all events was immaterial to the issue before the Court.

3rd. That the presiding Judge charged the Jury, that where a nonsuit was granted in a case where defendant was in custody of the Sheriff upon bail process, and under a conviction of fraud, the Sheriff must discharge him without a motion in Court to that effect.

4th. That His Honour charged that the plaintiff, in consequence of the nonsuit in the case against Stazinsky, had suffered no damage, although plaintiff proved that Stazinsky's notes were still in his possession, unpaid, and that by the verdict of the Jury, Stazinsky possessed fifteen hundred dollars, which would have been more than sufficient to have paid the plaintiff's debt, and which would have been recovered, if the Sheriff had not suffered the prisoner to escape.

5th. That it appeared in evidence that the escape took place in April, 1821, and the nonsuit in the case of Baker vs. Stazinsky, was not ordered until the year 1823; and this was an action against the Sheriff, for an escape long prior to the nonsuit, and upon mesne process; and,

6th. That the Jury were bound to find for the plaintiff, although they may have awarded only nominal damages.

Gadsden, for the motion.

_____, contra.

CURIA per NOTT, J. The grounds taken in support of this motion present but two questions for the considerations of this Court:

1st. Whether the entry of the Clerk, of the order for a nonsuit in the case of Baker against Stazinsky, was admissible as evidence of the termination of the cause?

2nd. Whether the presiding Judge did not err in charging the Jury, that the plaintiff, by suffering a nonsuit, virtually discharged Stazinsky from imprisonment, and that that fact proved that he had sustained no injury.

1st. There can be no question, that out of the Court in which the proceedings are had, a regular judgment is the only legitimate evidence of the termination of a cause, for the obvious reason that the non production of the judgment would furnish a presumption that an intermediate or interlocutory order had been reversed or set aside; but this reason does not apply in cases where the proceedings are had in the same Court in which they are offered in evidence; for in legal contemplation, the whole record is before the Court, and in reality are always at the command of the Court, and for that reason, it is not necessary in pleading to make profert of a record of the same Court. I should apprehend, therefore, that whatever was calculated to prove that the plaintiff could not have proceeded in his cause against Stazinsky was admissible as evidence of its termination. Had the plaintiff

the legal right, and would he have been permitted to proceed with this order staring him in the face, although no formal judgment had been entered up? I think not; for although the order could not have been strictly pleaded in bar, the Court would have stayed the proceedings and given the defendant leave to enter up his judgment; and precedents are not wanting in which this Court have permitted the amendment and perfection of a record, according to the truth of the case, even after the trial below, and would do so now, if it was necessary to the justice of the case.

2nd. In connection with the second question, it will be necessary to premise that Stazinsky was arrested by the defendant on mesne process, at the suit of the plaintiff, on the 30th December, 1820. That he filed a petition praying for the benefit of the Prison Bounds Act, accompanied by a schedule of his estate and effects, and upon the trial of an issue made up on a suggestion of fraud, he was found guilty in having kept back \$1500 which he had in cash, and that subsequently to these proceedings, to wit, on the 15th April, 1821, he made his escape from the prison. The plaintiff also proved on this trial, that Stazinsky was indebted to him the amount for which he was arrested, \$812, besides interest. The order for a nonsuit was entered on the 11th June, 1823, more than two years after Stazinsky had escaped. There is no question, and, indeed, it is not controverted, that on the escape of Stazinsky, the plaintiff was entitled to an action against the defendant, and that he was not bound to prosecute that action further, and although he might do so if he had been delayed, or suffered any other loss in consequence of it, he was still entitled to recover from the defendant to that extent (see the cases cited, 1 Saunders, 331; 2nd Wilson, 294; 5th Johnson's Rep. 182;) and in all these cases the question necessarily is, what damage has the plaintiff

sustained? It is said, and that is in effect the error complained of, in the charge of the presiding Judge, that the nonsuit is conclusive evidence that the plaintiff has sustained no injury, and was not, therefore, entitled to recover. A nonsuit is clearly not decisive of the right of the plaintiff to recover. He may bring a new action for the same cause, and the judgment of nonsuit will not be a bar. It could not, therefore, be conclusive as to the fact, that Stazinsky was not indebted to the plaintiff in the sum for which he was arrested. But the argument principally relied on, and which I have no disposition to avoid, is, that a nonsuit being the result of those proceedings, it follows that if Stazinsky had remained in custody, the plaintiff would not have recovered against him in that action, and, therefore, has sustained no injury. A nonsuit, strictly speaking, is the voluntary act of the plaintiff, and the judgment is founded on his supposed neglect to bring on the issue to be tried according to the course and practice of the Court; and judgment, as in case of nonsuit, is awarded in those cases, when the plaintiff fails to prove the facts necessary to support his action. Now, let us suppose that the plaintiff was guilty of a default, and was, therefore, nonsuited, or that he had failed to prove the facts necessary to support his action, or what sometimes happens, that he has been properly nonsuited; and how, I would ask, is the situation of the plaintiff rendered worse, or the defendant's better. The fact of Stazinsky's escape rendered the defendant legally liable, and the defendant might have maintained an action against him—2d. Esp. 239. The plaintiff was not bound to pursue him, and whether he abandoned the pursuit in the instant, or two years after, cannot be material; if the right to abandon once existed, it still remained. Was he nonsuited for defect of proof? or was the nonsuit improperly granted? What is it that imposes on him the obligation to

incur the expenses of preparing for trial in the one case, or of prosecuting an appeal in the other, if (as is said to be the fact) Stazinsky had escaped beyond his reach? If, as is supposed, the law imposed this obligation on him, it would necessarily have imposed on the defendant the corresponding obligation to indemnify him for those expenses, and so far from benefiting the defendant, he would have been prejudiced by it. So far, therefore, from the nonsuit being conclusive evidence that the plaintiff had sustained no injury, it is rebutted by the proof of the debt due by Stazinsky, and does not weigh a feather.

A question not necessarily involved in the preceding view is raised in the third ground of the brief. It is for the supposed misdirection of the Judge in charging the Jury, that a defendant, on mesne process, is entitled to be discharged on a nonsuit ordered, although he has been convicted of rendering a fraudulent schedule on an application for the benefit of the act. About this, I think, there can be no question. The object of his confinement was, that his body might answer the plaintiff's suit; when that was at an end, the Sheriff had no authority to detain him longer.

Motion granted.

CAULFIELD VS. M'ALISTER.

The act of assembly exempting certain articles of a debtor from levy and sale, includes as well levies and sales under distress warrants for rent, as under executions.

This was a case of replevin, in which the question made, was whether the act of 1823, which provides, "that from and after the first day of March next, the following articles shall, in all cases of debt contracted after that period, be exempt from levy or sale for the same," did exempt the articles enumerated from sale under a distress warrant for rent.

RICHARDSON, J. who tried the cause, held that the act did not comprehend such cases; and the point was now taken up to this Court, and was argued by *Peronneau & Finley*, for the motion, and opposed by *Elliott*.

CURIA *per* NOTT, J. If we look to the object of the Legislature for the construction of this act, I think there cannot be two opinions on the question. The object manifestly was, that every family should be permitted to retain against a creditor those articles of the first necessity without which they could not subsist, and deprived of which, they would not have the means of obtaining a livelihood. It is, therefore, made to operate prospectively, that every creditor may be considered as contracting with reference to its provisions; and all the reasons which could have lead to an exemption from levy and sale, under execution, would equally require an exemption from a distress for rent. It only remains to inquire, then, whether the words of the act will authorize that construction. The words of the act are, "that from and after the first day of March next, the following articles shall in *all cases* of debt *contracted after that period*, be exempt from levy or sale for the same." I do not know that the word *levy* is peculiarly applicable to an execution. In Jacobs' Law Dictionary, title "*Levari facias*," it is said, the *levy* (*levari*) is used in law for, "to collect or exact;" and it appears from the same author, that it is expressly used in reference to service for rent. *Levari fœnum*, he says, signifies to make hay, and *una locatio fœni* was one day hay making; a service paid to Lords by their inferior tenants; and in common parlance, levying a warrant of distress is as familiarly used as the levying of an execution; but a further view of the act seems not only to authorize, but to require this construction. They are exempted from levy or sale. The word "sale" appears to have been introduced, as if the Legislature, apprehen-

sive that the word levy might admit of too narrow a construction, intended to extend the exemption to every kind of sale for debt. I think, therefore, that, both from the letter and spirit of the act, it applies as well to distress for rent, as to the levy of executions, and that we should fall short of fulfilling the benevolent intentions of the Legislature, or of giving full effect to the law by any other construction. The motion, therefore, must be granted.

• • *Motion granted.*

BELSER VS. IRVINE.

The plea of nil debet to debt on bond is irregular, but is a substantial plea; and if the plaintiff choose to go to trial on such an issue, he must be bound by the result; and the sum found by the Jury will be presumed to be the amount actually due.

Either party, in an action of debt on bond, may submit the condition to the Jury, and where on the plea of nil debet the Jury have found a verdict for ten cents, the Court will not after a lapse of ten years, interfere with the verdict, though an error might possibly have been committed.

The plaintiff obtained a verdict in May Term, 1815, in an action of debt on a replevin bond, in these words:—
“We find for the plaintiff ten cents and costs.” The declaration contained the usual count on a money bond, and the plea was nil debet. The judgment was filled up as on a plea of non est factum, on a money bond, and for the amount of the penalty. Execution issued, but no proceedings took place until 1825, when an action was brought to revive the judgment. In 1826, a motion was made before Mr. Justice Gantt to set aside the judgment, as erroneously entered; but he ordered it to be amended to correspond with the pleadings. Upon application to the Clerk of the Court to have the judgment amended, he decided that it could only be entered up for ten cents. The Clerk was ruled before Mr. Justice Bay to shew

cause; and on hearing the rule, the Judge determined in conformity with the opinion of the Clerk.

The case was now brought to this Court, on two points, viz:—1st. That the judgment might properly be entered up for the penalty; and, 2dly. If not, that a repleader should be awarded.

Rice, for the motion, cited Com. Dig. Tit. Pleader, W. (17); Pub. Laws 10. Tidd, 87; Stevens on Pleading, 118; *Treasurer vs. M'Guire*, Harper's L. R. 474.

Furman, contra. 1 Brev. 243; *Hart vs. Tobias*, 2 Bay, 408; 1 M'Cord 28, 299; 3 M'Cord 93; Harp. L. R. 215; Chitt. P. 477; 1 Lord Ray. 169; 3 Bos. & Pul. 348; 1 Salk, 664.

CURIA per NOTT, J. The plea of *nil debet* to a bond is certainly irregular, but it is, nevertheless, a substantial plea. It puts in issue the question, whether the defendant owes any thing, and how much, and if the plaintiff chooses to go to trial on such an issue, he must be bound by the result; and we are to presume that the sum found by the verdict was the sum actually due. But suppose the plea to be a mere nullity. The plaintiff had a right to submit the condition of the bond to the Jury, and the defendant might compel him to do so, (see act of 1792, 2 Brevard, 355,) and that view of the subject will bring us to the same conclusion. The form of the verdict authorizes us to believe, that the sum assessed by the Jury, though small, were the damages really sustained by the plaintiff, or the actual amount which he was entitled to recover. And even if we were to suppose that the error may possibly exist, of which the plaintiff complains, it is his own fault, and it would be attended with the most dangerous consequences to unravel the proceedings of Courts after a lapse of ten years, for a supposed error, which is at most conjectural, and which, if it did not commence with the party complaining,

has been acquiesced in by him, until now. We might commit a still greater error by suffering the matter to be disturbed at this late day. The motion must, therefore, be refused. *Motion refused.*

R. W. GAUSE vs. B. GAUSE, Ex'r. J. J. Gause, and others.

A will made in another State, according to the laws of that State, but not executed in pursuance of the requisitions of our laws, either as to real or personal property, cannot be admitted to probate in this State, in the first instance; but if admitted to probate in the foreign State—*quere*, whether that probate will give it currency here, when offered for proof, as to the personal property?

This was an appeal from the Court of Ordinary for Horry District; and on an issue of *devisavit vel non*, the Jury found the following special verdict, viz:—

“We find that John J. Gause, late of Horry District, made his last will and testament on the second day of February, 1826, and shortly, thereafter, died. That the said last will and testament was executed by the testator, in the presence of only two subscribing witnesses; but another person who was present was requested to subscribe his name as a witness, but did not do so. That the last will and testament was made and executed in the State of North Carolina; but the testator's place of residence was in Horry District, South Carolina. That the said last will and testament was admitted to probate by the Court of Ordinary, for Horry District, as stated within. If the Court is of opinion that the said will from the foregoing statement is valid and legal (the same being attested by only two subscribing witnesses) to pass the estate therein mentioned, then we find for the defendant, Benjamin Gause, Executor of the said will. But if the Court should be of opinion that the said will is invalid and illegal to pass the real and personal estate therein

mentioned, we find for the appellant, R. W. Gause, and that the said will is null and void and improperly admitted to probate."

Upon this verdict the Circuit Court gave the following judgment, viz : " That the paper purporting to be the last will and testament of J. J. Gause, having been attested in the presence of only two subscribing witnesses, is null and void, and was improperly admitted to probate in the Court of Ordinary. It is, therefore, ordered, that a verdict be entered for the appellant, and that he be permitted to enter up judgment thereon, and that the decree of the Court of Ordinary be reversed."

From this judgment an appeal was taken up to this Court, and the following points stated.

1st. That the will of J. J. Gause having been executed in the State of North Carolina, where the testator died, without having left that State from the time of the attestation thereof, and having been duly attested in the presence of a sufficient number of witnesses to pass real and personal property by the laws of that State, was a good and valid will.

2nd. That three witnesses were called to witness the execution of the will and saw the testator subscribe his name.

King, for the motion.

The right to dispose of property one has acquired, is a natural right, and the manner alone is the subject of statutory regulation. 1 Phil. 375. In cases of intestacy the law of the domicile must regulate the disposition of the personalty, but with respect to wills the rule is different. A will made where one happens to be at the time of his death, and executed according to the law of that place, is good all the world over as to the personalty, unless it was intended to evade the law of the domicile. 1 Bin. 336. 12 Wheat. 172,

Armstrong vs. Lear. Code. Nap. 999. Heineccius, Voet. 271. 3 Dallas, 370. in Note.

CURIA *per* NORT, J. In the argument of this case, it has been presented to us in a shape somewhat different from the case made in the special verdict. It is not now contended that the will is effectual to pass the lands in this State, nor that the circumstance of a third person having been present at the execution of the will, but who did not subscribe it, was such a fulfilment of our law as to give it effect. The only question submitted to us, is, whether a will made in another State and not executed according to the requisitions of our act, can be admitted to probate in this State. And although the question has been argued with a good deal of learning, a doubt even has not been raised in my mind on the subject. The act of 1824 provides, "That after the first day of May next, all wills or testaments of personal property, shall be executed in writing and signed by the testator or testatrix, or by some other person in his or her presence, and by his or her express direction, and shall be attested and subscribed in the presence of the testator or testatrix by three or more credible witnesses, or else they shall be void and of no effect." This is a rule of property prescribed by the supreme authority of the State, and must, therefore, be the governing principle in all our courts.—Vinnius, Heineccius and Voet, and other ancient authors have been introduced to shew that a will made in any place, according to the laws and customs of that place, will have the same effect in every other country, though not executed according to the forms and ceremonies of that country. But that is a question which I am not disposed to contest. I have no doubt that a will made in North Carolina and executed according to the laws of that State, will be effectual to pass the personal property of the testator in this State, though not executed accor-

ding to the forms prescribed by our act. But the question, is, in what manner shall it be authenticated here? In Toller's Law of Executors, 71, it is said, if the testator reside in Scotland and have effects there and in England, the will is proved in the first instance in the Court of Great Sessions in Scotland, and a copy duly authenticated and being transmitted hither, it is proved in the Prerogative court and deposited as if it were an original will; and that, I apprehend, is the correct method. The will, in the first instance, must be proved where the testator dies. It is then received elsewhere on the faith and credit due to the Court where it is admitted to probate. It is, further, laid down by the same author, 71, that if a will be made in a foreign country, disposing of goods in England, it must be proved here. But, if the effects are all abroad and the will be proved according to the custom of the country where the testator died, it will be sufficient. Now when it is said that a will made abroad disposing of goods in England, must be proved there, that is in England, I presume it means that it must be proved according to the laws of England. In the present case, the testator resided in this State, but was taken sick and died in North Carolina, having first made his will disposing of his property here. Whether under such circumstances, the will ought to be proved in this State or in North Carolina, is a question on which I shall express no opinion. All I mean to decide is, that when a will is offered for probate in this State, it must appear to be executed according to the laws of this State, or it cannot be admitted. If it should be offered for probate in North Carolina, and there should not appear to be any assets in that State, it may become a question whether it ought to be admitted there; and if it should be admitted, it may perhaps still be a question whether the probate under such circumstances, will give it curren-

cy here. In the Duchess of Kingston's case, it was held that a will, though made in France, where she was domiciled, being made by an English subject, in the English language, and according to English forms, and to be executed in England, was valid as to personal property in England, though not being made according to the French law, it would have been of no validity in France. 12 Wheaton, 173, *Armstrong vs. Lear*. But I infer from the circumstance of its being executed according to the English forms, that it was on that ground alone it was admitted in England. See also 11 Viner, 58, tit. *Ex'or.* A. 1 Vern. 397, *Jauncey vs. Scaley*; *Ambler*, 415, *Burn et uxor vs. Cole*. Vinnius on whom much reliance has justly been placed, says, there can be no doubt that if a statute should expressly provide that every testament of goods should be made in conformity to the *lex loci*, there might be room for discussion, and I have shewn by our act, that it is provided that every will or testament of personal property shall be executed in the presence of, and subscribed by three witnesses, or it shall be void and of no effect. Voet does indeed say that if a citizen of Utrecht, not with a view of evading the law, but by mere accident should be in Holland, and after making his will there, in consequence of sickness should suddenly die there, that will as well in relation to moveable as immoveable property in Utrecht, ought to be effectual, though made without such license as the laws of Utrecht require. But that is a position which, I think, it will be difficult to maintain, for all the writers on the subject admit, that in order to pass lands, the will must be executed according to the forms prescribed by the laws of the country where they are situated. If the writer intended to put it on the ground of necessity, and that because the testator could not in a foreign country obtain a license which was necessary to give it validity at home, then the rule will only apply when

the necessity exists, which is not pretended in this case. I concur, therefore, in opinion with the presiding Judge below, that as the will has not been admitted to probate in North Carolina, where the testator died, nor executed according to the form prescribed by our act, it ought not to be admitted to probate in this State, and that the motion must be refused.

Judgment affirmed.

JAMES L. PEIGNE VS. JOHN SUTCLIFFE.

An infant, at the age of discretion, is liable in an action on the case, for the embezzlement of goods entrusted to his care.

In the month of September, 1821, the plaintiff delivered to the care and custody of the defendant, John Sutcliffe, Flour, Groceries and Dry Goods, to the amount of \$1000, to be delivered to one John Lightbourne, at Rio Pongus, on the coast of Africa. The defendant was mate of the schooner Calypso, and received the goods on board the schooner as the agent of the plaintiff for the purposes aforesaid, and proceeded on the voyage and arrived in safety at Siere Leone, but instead of delivering the goods entrusted to his care, to Lightbourne, he sold them and converted the proceeds to his own use. It was for this breach of trust that the suit, (a special action on the case,) was brought to recover the value of the goods and damages. To this action the defendant pleaded infancy, and the plaintiff demurred generally.

Hunt, on the part of the defendant argued that although the declaration in this case was in the nature of a tort, yet in substance it was on contract, and an infant was not liable on contract for goods sold and delivered to him. *Carthew*, 160. If the defendant had been of full age, he would have been liable for the value of the goods delivered to him, and an action for money had and

received would have lain against him. But as he was an infant under age, an assumpsit could not be converted into a tort, so as to make him liable in that form of action. 1 Comyn on Contracts, 149-150. And that if one deliver goods to an infant upon a contract, he shall not be chargeable in trover or in any other action for them.

Yeadon, contra. This is a case of tort, and was declared on as such. These goods were delivered to the defendant upon a special trust and confidence that he would safely deliver them to Lightbourne, instead of which he betrayed his trust and sold them, and converted the money to his own use. There then was a gross and manifest fraud or tort; an act not only of omission but one of commission, which makes him clearly responsible as for a tort. He admitted that an infant was not liable on a contract for the sale and delivery of goods (except for necessaries) but in this case, there was no sale and delivery to him. It was a delivery for a special purpose, and a conversion to his own use, contrary to good faith and the confidence the plaintiff had placed in him. He cited 1 Espinasse, 172. 1 Nott & M'Cord, 197.

Finley, on the same side, urged that this was an action ex delicto and not ex contractu. It was not converting an assumpsit into a tort, as was said on the other side, but for a manifest fraud. Assumpsit could not have been maintained for it. The goods were not charged to defendant as sold to him, but invoiced as goods shipped on board the Calypso to Lightbourne under the charge of defendant, and embezzled by him, and therefore, he was clearly chargeable in this form of action. 6th Cranch, 226; 3d Bacon, 585.

BAY, J who heard the demurrer, delivered the following judgment. "I have considered this case, and I am decidedly of opinion that the demurrer to the plea of infancy ought to be sustained. It is a well established rule

of law, that all contracts with infants are void or voidable except for necessities, and the reason of the law is founded on the supposed want of judgment and discretion in their contracts and transactions with others, and it is to prevent them from being over-reached by persons of maturer years and experience. But there are other cases in Law where this indulgence and protection shall not extend to an infant; as in all cases of criminal actions and wrongs done to the persons or estates of another; Infant's Lawyer, 34. The reason assigned in such cases, is, that *malitia supplet aetatem*, especially if the infant be of the years of discretion, and it was alleged in this case that the defendant was between 19 and 20 years of age, (which was not denied,) at the time these goods were committed to his custody, and there has been a most evident wrong done to the plaintiff. In the first place there was a shameful breach of confidence in not delivering these goods agreeably to order; and in the second place, an equally shameful and dishonest piece of conduct in converting the proceeds to his own use, both of which are exceptions to the manifest rules of exemption which the law has allowed for the protection of infants from their own imprudent transactions in their dealings with others, as laid down in the authorities quoted. The case quoted from Carthew, 160, by the Counsel for the defendant was one of a mercantile nature, where it was held that an infant who was a partner in a mercantile house, was not liable on a bill of Exchange drawn by the house and returned protested, although the other partners were. So, in like manner, if goods are sold to an infant, (except for necessities,) he is not liable, and such sale shall not be converted into a tort, so as to charge him in that form of action as laid down in 1 Comyn on Contracts, 149-50, and also as mentioned in 8th Term Rep. 335, which were relied on by the Counsel for the defen-

dant in his argument. In the present case however, there was no contract for the sale of the goods, and the present action is one of a special nature founded on fraud and not on contract, consequently none of the authorities urged on the part of the defendant, will apply or bear the defendant out in support of his plea. On the contrary, although the law will not allow an infant to be charged on contract, except for necessities, yet he shall be answerable in all cases of a criminal nature and for torts and trespasses, &c. &c. 3rd Inst. 301. 8 Rep. 44. Infant's Lawyer, 34. Under the circumstances of this case the law will charge an infant in all cases arising ex delicto or for wrongs done the plaintiff, and in some cases, he is liable even in assumpsit for money had and received; as where money has been embezzled by him; 1 Peake's Nisi Prius 223. Lord Kenyon said the case was new and had not been decided; but he was of opinion that this action, though in form arising ex contractu, in fact arose ex delicto, and as defendant could not have defended himself by reason of infancy if an action of trover had been brought for the money, so he ought not to be allowed to defend himself on that ground in this action.— The same doctrine is laid down in 1 Nott & M'Cord, 197; that an action of deceit will lie against an infant on a warranty for the sale of a horse; and even where the form of the action is ex contractu and the substance is ex delicto, the defence of infancy will not avail. 6th Cranch, 644. C. J. Marshall laid it down in a case brought up from Alexandria upon a writ of error, as the opinion of the Supreme Court, that infancy is no complete bar to an action of trover, although the goods converted be in possession of defendant in virtue of a previous contract. The conversion is still in nature of a tort; it is not an act of omission but of commission, and it is within the class of offences for which infancy can afford no protec-

tion. The case was that of 70 barrels of Flour shipped at Alexandria under the care of defendant as supercargo, to be sold at Norfolk. Instead of obeying the orders of plaintiff, defendant shipped the Flour to the West Indies which was lost at sea and for this the action was maintained. In 3d Bacon, 585, it is said, were an infant being master of a ship at St. Christopher's beyond sea, by contract with another undertakes to carry goods to England and there deliver them, but does not deliver them agreeably to the contract and wastes and consumes them he may be sued for the goods in a Court of Admiralty, though he be an infant, for this suit is but in nature of detainue or trover and conversion at Common Law.— From all the authorities and the reason and justice of the case, I am of opinion that the demurrer to the plea should be sustained.

From this decision the defendant appealed, and moved to set aside the judgment, but the Court of Appeals affirmed the judgment for the reasons assigned.

Judgment affirmed.

The Adm'r. of WILLIAM CONYERS VS. JOHN MAGRATH.

Unliquidated demands do not bear interest, except in cases where the defendant has been guilty of fraud or imposition.

If an agent sell without disclosing the name of his principal, he will in respect to the purchaser be regarded as the principal.

To an action arising on the contract of the agent, the purchaser may in general set off a debt due by the agent to himself; but not where he has notice of the agency before his responsibility for the agent actually accrues.

The agents being vendue masters, at whose sale the purchaser bought for cash, precludes the purchaser from discounting a responsibility which he had assumed in favour of the agent, which had not then accrued.

This action was brought to recover the value of three bags of Coffee, 725 lbs. equal to \$173 21, brought by defendant at a sale by Rapeleye, Bennet, & Co. Vendue Masters. The coffee belonged to plaintiff's intestate.— About a month after the coffee was sold, an account was rendered to the defendant for the coffee; he said he would see Rapeleye, Bennett, & Co. The account was in the intestate's hand writing and in his life time. By the books of the intestate, three bags of coffee were charged to the defendant on the 2d January, 1824, sold in December, 1823. A note was due on the 27th February, 1824, by Rapeleye, Bennett, & Co. to defendant. The writ in this case was issued on the 25th March, 1825. The defence was that the coffee was purchased of Rapeleye, Bennett, & Co. and settled for with them. It appeared that Rapeleye, Bennett, & Co. had drawn a note for \$700 (payable to the defendant) on the 27th December 1823, due sixty days after date. This was the renewal of a note for \$900, which was protested for non payment on the 28th February, 1824; This note was paid by the indorser at the Bank, after protest of the drawer.

HUGER, J. who heard the cause, charged the jury that the principal might sue the purchaser, and although the purchaser might set off any debt due to him by the factor,

yet that in this case, there had been nothing due to defendant by the factors at the time of sale, and for weeks after, for the debt set up by defendant was a note not due until 28th February, and the coffee had been sold in December previous. That the renewal given in December for a note due in February, authorized them to conclude that a fraud had been intended on the intestate.

A verdict was found for the plaintiff, allowing him interest, from which the defendant appealed on the following grounds :

1st. That the presiding Judge charged the Jury that interest ought to be allowed on the purchase money of the coffee sold in this case and bought by the defendant.

2nd. That the evidence established, that Rapeleye, Bennett, & Co. were alone known to defendant in the transaction, and as they acted as principals and owners of the coffee, the set-off should have been allowed against them.

3rd. That the Judge charged the Jury erroneously inasmuch as he told them that he thought the transaction was fraudulent.

4th. That the presiding Judge mistook the law when he charged the Jury that, as the note was not due when the demand for payment was made by Conyer's agent on defendant, a set-off could not be made.

5th. That the presiding Judge erred in supposing that it was essential to a set-off in cases like this that a fraud should have been practised on defendant by the commission merchants, or that defendant should have purchased with the intent to set-off.

Dawson & Cruger, for the motion.

Hunt, contra.

CURIA *per* JOHNSON, J. The grounds of this motion involve but two questions : 1st. whether the plaintiff was entitled to recover interest on his demand, and 2ndly, Whether the defendant could, by way of discount, set-off

against this action the debt due to him from Rapeleye, Bennett, & Co..

With respect to the first, there exists no doubt. Formerly there was some diversity of opinion as to the cases in which interest was allowed, and cases may be found in which the Court has gone a great way in supporting claims for interest, but the whole current of the more recent cases has been opposed to allowing it on unliquidated demands, except in cases where the defendant has been guilty of fraud or imposition, or taken an undue advantage of the plaintiff, and of money lent or actually had and received. Between this rule and the allowance of it in every case where the time of payment is ascertained, there is no medium, and the Courts have so uniformly set their faces against its indiscriminate allowance, that to unsettle the law now, would take the whole community by surprise. *Bulow vs. Godard*, 1st. Nott & M'Cord, 45; *Rose & Rogers vs. Beatty*, 2 Nott & M'Cord, 538; There is also a late case on this subject, decided, I think, at the last sitting in Columbia, the title not recollected. On looking into the circumstances of the case, I have not been able to discover in them any thing calculated to take it out of the general rule that an unliquidated demand will not bear interest. It appears to have been a contract in the ordinary course of business to pay for goods purchased at Vendue, and they were delivered to the defendant on the faith that he would pay the money when called upon, but which he has neglected to do, and such is in effect the legal operation of every contract to pay money on a day certain. In this respect, therefore, the verdict is wrong.

In relation to the second question, the following legal conclusions are, I think, fully sustained by the cases cited at the bar, and will be conceded—1st. That, if an agent sell without disclosing the name of his principal, he will, in respect to the purchaser, be regarded as the principal:

2dly. That, to an action arising on the contract of the agent, the purchaser may in general set off a debt due by the agent to himself. The reason of these rules are founded in the security and protection which they afford against secret and fraudulent combinations to do injuries to others, and against which no human foresight or prudence could guard, but for the shield which they furnish; but when they have had their legitimate operation they are functus officio, and it will not be permitted that, in the hands of those who were protected by them, they should be converted into a sword to inflict on another the very wound they were designed to prevent. Why is it, that when the name of the principal is not disclosed, the law regards the agent in that character? For the obvious reason, that the party contracted with cannot, by any probability, know that any one else has an interest in the thing contracted about, and acting upon the belief, it would be unreasonable that he should not have the benefit of any thing done in pursuance of it. If, for instance, he had paid money on the faith of such contract, or incurred responsibilities for the agent, or in fine, had done any other act which would place him in a worse situation than he would have been if he had known the agency, then he would be protected, but surely not otherwise. Let us then examine the case under consideration with reference to this principle. Rapeleye, Bennett & Co. sold the goods of the plaintiff to defendant without disclosing their agency and according to the rule, the defendant was entitled to regard them as principals. They failed in trade, and the amount being unpaid, they turned over this demand to the plaintiff, and the defendant then had notice of the agency. Supposing this to be the whole case, is there any question that the plaintiff is entitled to recover? The defendant had received the goods, and in good faith and common honesty, he was bound to pay

for them, and the plaintiff was entitled to receive it, and from the time of the notice, the defendant's liability must have attached. But, it is said, that the defendant has a right to set off a demand which he has against the agent to this action, under the second rule which has been conceded; and it is true, that at the time this action was brought, that demand was well founded; but on examining all its features, it will be found to work a manifest injustice to the plaintiff, and cannot, therefore, be covered by the rule. That demand, it will be recollected, originated in an accommodation indorsement made by defendant, for Rapeleye, Bennett & Co. and of course gave him no claim against them until he had actually paid the money. This was not done until some time after he had notice of the agency, and when, as I conclude, his liability to the plaintiffs had attached of necessity; therefore, it could not be set off against this demand. Again, admitting that Rapeleye, Bennett & Co. were, at the time the goods were sold, under a moral liability to the defendant, yet it is manifest that the defendant did not make the purchase in reference to it. He knew that they were vendue-masters, and that their principal dealings were in the goods of others, and the sale being for cash, was wholly inconsistent with any protection which such a contract could afford him against his liability or loss; so that in any view of the case the situation of the defendant, with respect to the plaintiff, is precisely the same as if he had known of the agency of Rapeleye, Bennett & Co. at the time of the sale. He had not, therefore, at the time he had notice, paid money, incurred responsibilities, or done any other act which placed him in a worse situation than he would have been, if he had known of the agency at the time of the sale. There is another view of this case. It will not be controverted that a principal has the power to revoke a mere naked agency

ad libitum, or that after notice of such revocation, the agent can do no act which will bind the principal. Now the agency confided to Rapeleye, Bennett & Co. by the plaintiff's intestate, was to sell the goods and receive the money. They had executed this trust so far as related to the sale of the goods and according to this rule, the plaintiff's intestate had the right to stop their agency there. If it be objected that the agency committed to them was coupled with an interest, so far as regarded their commissions, the answer is, that by turning over the account to plaintiff's intestate, they had abandoned that interest, and it did not lie in the mouth of the defendant to gainsay it, and if, as I think, the agents were under no legal liability at the time to the defendant, they were uninjured by it, and the circumstances amounted to a relinquishment of the agency on the part of the agent, and a revocation by the principal, and their rights are to be judged of according to the state of things existing at the time. It is for these reasons ordered and adjudged that a new trial be granted, unless the plaintiff remit the interest found by the Jury, and that in the event of his doing so, the verdict shall stand as to the rest.

New trial granted nisi.

KECHELEY VS. CHEER.

The maker of a Promissory Note, against whom a judgment has been recovered, is a competent witness at common law in a suit by the same plaintiff, the lender against the indorser, to prove usury.

The lender can only be a witness under the act, where the usury is offered to be proved by the evidence of the borrower, and where the borrower is not a competent witness at the common law.

By the Usury Act, the *borrower* is made a competent witness to prove the usury, unless the person against whom such evidence is offered will deny, on oath, in open

Court, the truth of what is offered to be sworn to against him. In this instance, the borrower, Wharton, had been sued as the drawer of a note, and having offered to swear to the usury, the plaintiff had contradicted it upon oath, and had obtained a verdict. This was an action against the indorser on the same note, and the question was, whether Wharton was a competent witness to prove the usury, and if so, whether under the act, the plaintiff was permitted in this case, where the borrower was not a party, to have the benefit of his own oath.

HUGER, J. who tried the cause, rejected the witness, and admitted the plaintiff's oath. The Jury found a verdict for the plaintiff, and the points were now made before this Court.

Eckhard, for the motion, cited *Packhard vs. Knight*, 3 M'Cord, 71; *Mott vs. Dorrell*, 1 M'Cord, 350.

Kennedy, contra. *Thomas vs. Brown*, 1 M'Cord, 557; *Wallace vs. Nelson*, Harp. 148.

CURIA *per* JOHNSON, J. This is an action of assumpsit by the indorsee, against the indorser of a promissory note, and the defence is usury. It is assumed on the authority of *Packhard and Knight*, (3rd M'Cord, 71,) that the maker, against whom a judgment had been obtained on the same note, at the suit of this plaintiff, is a competent witness at common law to prove the fact of usury. In addition to this, and in affirmance of the right of the maker to be sworn by the rules of the common law, it was stated that the defendant had released the drawer, Wharton, and the question now is, whether the plaintiff can be permitted, under the act against usury, to contradict, on oath, what the drawer, Wharton, offered to swear as to the fact of usury. The act provides that, in all actions founded on usurious contracts, "the borrower or party to such usurious bond, specialty, contract, or agreement, &c. shall be, and is hereby declared to be a good and

sufficient witness in law to give evidence of such offence against this act, any law, usage, or custom, to the contrary, in any wise, notwithstanding. Provided, that if the person against whom such evidence is offered will deny in open Court, upon oath administered, the truth of what such evidence offers to swear against him, then such witness shall not be sworn."

All the rules which have been laid down for the interpretation of statutes are concentrated in the great leading rule, that the intention of the legislature must be preserved, and to which all others are mere auxiliaries leading to that result. Amongst those of this character, that which directs us in cases of doubtful construction to look to the old law, the evil and the remedy provided by the new law, is most likely to lead us to a correct conclusion. Apart from any thing contained in the act itself, it must be familiar to every one, having any knowledge of the science of the law, or conversant with the practice of the Courts, that by the rules of the common law, no one who is a party to a suit, or who had a direct pecuniary interest in the event, is a competent witness. Thus stood the old law. The act against usury, as if it was intended to guard against the possibility of mistaking the evil against which it was intended to guard, has pointed it out in the most explicit terms. It recites that, "whereas, it is to be feared that evil and wicked minded persons, for the sake of lucre and unjust gain, will often exact and take greater usury and higher rates of interest from necessitous persons than is allowed by this act, in hopes that their offences against this act may not be discovered for want of proof, as such transactions will be generally carried on when only the borrower and lender are present together, for remedy whereof," &c. And the remedy provided, as before shown, is that the borrower shall be a competent witness to prove the usury, unless the lender will contra-

dict, on oath, the facts to which he offers to swear, any law, usage, or custom, to the contrary notwithstanding. I have laboured without effect to substitute other words than those contained in the act to convey the idea that the legislature intended to alter the common law, no further than to let in the borrower as a witness, or to purge the conscience of the lender, where proof of the fact of usury could not be given according to the rule of the common law. It certainly never could have been intended to let in the lender to disprove the usury in all cases, indiscriminately. The whole act breathes a spirit of hostility towards it as a crying evil, and it was not necessary as a protection to the borrower, or for the suppression of the evil, that the parties to the contract should be let in as witnesses, when other evidence was in their power. It is impossible, then, that it could have been intended to operate in any other case than that in which, by the rules of the common law, the borrower was excluded, because, in every other case, it would have been useless. In the case under consideration, the borrower, Wharton, was a competent witness at common law to prove the usury, and according to this construction the plaintiff (the lender) ought not to have been permitted to be sworn to contradict him. It has been urged upon the Court with a laudable zeal, that the effect of such a construction would, in its operation, put the lender entirely in the power of the borrower, by furnishing the latter with a facility and temptation to perjury; but in weighing arguments *ab inconvenienti*, we ought to look to all the consequences. The very foundation of the rule for admitting the maker as a witness by the common law, is, that he has no pecuniary interest in the event of the particular case, nor can the record in any event be given in evidence against him. It is not so with the plaintiff. His interest is necessarily immediate and direct.—

Consequently, the temptation to perjury would, in legal contemplation, be the greater. The truth of this conclusion may be illustrated by the case under consideration. If a verdict should be found for defendant, Wharton could not plead that recovery to an action against him as maker, nor would it be evidence against him in an action at the suit of the indorser; but if a verdict was found for the defendant, he would in the first place be responsible for costs, and in the next, he would lose the security which the indorsement furnished for the payment of his debt. This argument, carried to the extent contended for, strikes at the foundation of the rule which admits the maker or other party to a note or other contract to be a witness in any case, and would revive that much disputed question which has been put to rest here by the case of Packhard and Knight; for the same facilities and temptations to perjury, whether it be with a view to personal exemption from liability, or to protect a friend who has indorsed, exists in every case where he may be a witness at common law; for whether the defence be, that the note was obtained by fraud or duress, or was without consideration, it is equally fatal to the plaintiff's right to recover, as if it was usurious; and the inducements to involve such transactions in mystery and obscurity are equally great, and all the reasons which would apply in a case of usury, are alike applicable to the cases before noticed.— A new trial is, therefore, ordered.

New trial ordered.

HARICK VS. JONES.

Though a third person sue upon a contract said to be usurious, and the defendant offers to swear to the usury, the lender, though no party to the suit, may under the act, be examined to deny the usury.

Notes originally founded on a good consideration, though afterwards sold for less than they are nominally worth, do not make a case of usury; but if originally discounted for less than their nominal amounts, it is usury.

This was an action on a promissory note for \$300 by the indorsee against the drawer. The defence was usury and the question was whether a person by the name of Willis, to whom the notes had been delivered by the drawer, in a contract charged to be usurious, was a competent witness in the suit of the present plaintiff against the drawer. The plaintiff having refused to swear to the usury, on the ground that he himself was ignorant of the facts, the defendant made himself a witness under the act, and objected to the evidence of Willis on the ground of interest. The Recorder of Charleston, however, before whom the cause was tried, admitted the evidence of Willis as well as that of the defendant. He charged the jury that they should look at the moment when the note was put forth to see whether it was contaminated with usury; that this was an accommodation note, created for the purpose of raising money; that if defendant sold it to Willis and obtained for it only one hundred dollars and a due bill for \$125, the usury was clearly proved and the verdict should be for the defendant; but that if defendant had by his agent, Willis, sold the note to plaintiff and plaintiff had given Willis for defendant full value for it, it was not usury though Willis had retained the whole to himself, or thrown it into the sea; that this reduced the question to two points: 1st. Was Willis the defendant's agent? and, 2nd. Did plaintiff, if he were, give Willis full value for the note? On the first question,

he thought it was proved both by Willis and by the admission of plaintiff himself, that Willis was but an agent to procure the money on the note and not himself the lender, but left it to the jury to decide. On the second ground he told them that the full value of a note was not always the sum expressed on its face, but the sum it was bona fide worth and this was for them to say; that a note was a fair subject of bargain and sale and after fixing the true value of this in their minds they should say whether the payment to Willis for plaintiff was equivalent to that value, and if it was, there was no usury in the case.

The jury found for the plaintiff, and an appeal was now taken up on the following grounds :

1st. That the consideration given by Willis to Harick was the true consideration of the note, and that the evidence fully established the usury.

2nd. That the defendant having proved that the plaintiff admitted to him that he had given to Willis a pipe of gin and one hundred dollars, and Willis having stated that he had received from Jones \$100, a pipe of gin and merchandise for the note, it should have been submitted to the jury, that one of the questions to be decided by them was, whether they should credit the defendant, or Willis, whereas, no such question was submitted in the charge.

3d. That Willis was an incompetent witness, having given the note in question to Jones, the plaintiff, in payment of articles furnished to himself, he became interested in sustaining the validity of the note.

Eckhard, for the appeal.

Clarke, contra.

CURIA per JOHNSON, J. The only ground which it is thought necessary to notice and decide, is that which calls in question the competency of the witness, Henry Willis, to give evidence in the cause. The defendant's own account of the transaction is that he contracted with

the witness for the loan of \$300 from which seventy five dollars were to be deducted for the forbearance for ninety days, and gave him a note for that amount, and received in consideration only one hundred dollars cash and the witness' note at thirty days for \$125. By the terms of the act against usury, the borrower, or party to an usurious contract, is declared to be a "good and sufficient witness in law to give evidence of offences against this act," &c. but it is provided that if the person or persons against whom such evidence is offered to be given, will deny on oath in open Court to be administered, the truth of what such evidence offers to swear against him, then such witness shall not be admitted to be sworn. The preamble of the act points most obviously to the policy as a clue to the meaning. It is apparent that by the terms "person or persons against whom such evidence was offered to be given," contained in the proviso, the Legislature intended to designate the party to the original contract, and not one who was necessarily ignorant of the transaction. Regarding Henry Willis then as the original party, and that is the footing on which the defendant puts his objection to his competency, and he was admissible under the act, and defendant ought not to have been permitted to be sworn, if Willis had offered to contradict on oath the facts to which he offered to swear. But this is no ground of complaint on the part of the defendant. The other grounds taken, present nothing more than the credibility of the defendant and the witness Willis; and although it is said that the Recorder did not submit the matter to the jury, it will not be believed that the counsel omitted to do so, and when the evidence was so directly opposed, it is impossible that the jury could have determined the case without deciding upon it. This disposes of the grounds stated; but there are other considerations arising out of the case, to the bene-

fit of which, I think the defendant is entitled, especially as it appears from Willis' own testimony, that he has practised on him one of the most gross and scandalous frauds that I have ever witnessed. It will be recollected that the defendant offered to swear and did swear that by the contract with Willis he was to give him \$75 for the loan, and although Willis in his examination states generally that he acted as the agent of defendant in negotiating the note, he is not hardy enough to take upon himself to deny the truth of this fact, and in this respect the oath of the defendant is not only uncontradicted, but, I think, fully sustained by the circumstances stated by Willis himself; for he not only detained the \$75, but he drank the gin and kept the other articles which he got from plaintiff in payment for the note. I think too that there was error in charging the jury "that the full value of the note was not always the sum expressed on its face, but the sum it was bona fide worth, and that a note was a fair subject of bargain and sale, and after fixing the true value in their minds, they should say whether the payment to Willis was equivalent to that value, and if it was, then there was no usury in the case." I am not disposed to call in question the correctness of this rule, so far as it applies to notes originally founded on a legal consideration and sent into circulation; for nineteen twentieths of the commerce of the world is carried on through the agency of these and like securities, and when once they are legally in the market, they become the fair subject of traffick. But to apply it to the creation of a note, would strike at the very root of the statute against usury. The commercial value of negotiable paper, when in the market, is determined sometimes by the probable solvency of the drawers and indorsers; sometimes by their character for punctuality. The time and place of payment, also have their influence; sometimes they are sold at a

discount, and often command a premium. The statute, however, makes none of these distinctions : loans to the rich and the poor, the prompt and the tardy, are all put on the same footing, nor is time or place of any consequence, except so far as time is necessary to measure the amount of interest. Every contract reserving interest at a greater rate than seven per cent. per annum, is declared to be void. The Jury might then have been misled by this charge, and for these reasons a new trial is granted.

New trial granted.

The Assignees of KREBBS vs. MILLER.

A. took the benefit of the Prison Bounds Act, and refused to include in his assignment a horse, and pending an appeal as to the exemption of the horse, A. sold it to the defendant. The Court of Appeals decided that the horse was not exempt, and the plaintiff now brought suit against the defendant for the horse, held that the sale was good against the claim of the plaintiff.

The assignment under the act has no retrospective operation.

On the 10th February, 1826, the recorder of the City Court of Charleston made an order that Andrew Krebs, who was in custody at the suit of the plaintiffs, should be discharged under the provisions of the Prison Bounds Act, on his making the usual assignment of the property contained in his schedule with the exception, among other things, of his troop horse, which was now the subject of dispute. In pursuance of this order, he made an assignment in blank on the back of the schedule, and was forthwith discharged. The plaintiff appealed from this order, so far as it excepted the horse, and upon the hearing in the Court of Appeals, it was set aside; but in the mean time, and pending the appeal, Krebs sold the horse to the de-

fendant. At the trial, the plaintiffs' counsel filled up the blank assignment in conformity with the order of the Court of Appeals, under an agreement that his doing so should not effect the legal rights of the parties. The plaintiffs now claimed the right of property in the horse, and denied the right of Krebbs to sell it: 1st. Under the order of the Court of Appeals, which they contended by legal operation had relation back to the date of the assignment; and, 2dly. Under the assignment so filled up.

A nonsuit was ordered, and the question was now brought up by *Finley & Gray*, and opposed by *Furman*.

CURIA *per* JOHNSON, J. The arguments in support of the first position, are drawn principally from analogy in the operation of the bankrupt laws of England; and it is true, that an assignment under a commission has relation back to the act of bankruptcy, and all intermediate acts are avoided. But there are several very marked distinctions between this system and our insolvent laws. This operation is the effect of an express provision of the statutes of bankruptcy. Our acts contain none such. The bankrupt laws are for the benefit of creditors—are compulsory on the debtor, and prevent him from doing an injustice to his creditors. Our insolvent laws are for the debtor, and enables him to discharge his person, to which, under the general law, his creditor was entitled, by assigning the whole, or so much of his estate and effects as will satisfy his creditors. In the case of bankruptcy, the assignment is effected by operation of law; in the other, it is the voluntary act of the party. The judgment or order of the Court of Appeals could not, therefore, operate as an assignment, either at the instant, or by reference back to the date of the assignment made by Krebbs. The second position is equally untenable. The assignment made by Krebbs, was in conformity with the order made by the recorder, in which the horse in ques-

tion was expressly excepted and reserved to him, and the effect contended for would be in direct opposition to the order itself, and the intention of Krebbs, and would give the act a compulsory, and not a voluntary operation.

Nonsuit sustained.

LAW CASES
ARGUED AND DETERMINED IN
THE COURT OF APPEALS,
OF
SOUTH CAROLINA,
IN

JANUARY TERM, COLUMBIA, 1828

JUDGES PRESENT.

HON. ABRAHAM NOTT, *Presiding Judge.*
HON. C. J. COLCOCK,
HON. DAVID JOHNSON.

M'KINNEY VS. QUILTER.

M. having an execution in the hands of the Sheriff against one S. the defendant Q. promised the Sheriff that if he would not push the execution, he would pay the costs, in consequence of which the Sheriff did not proceed. Whereupon M. sued Q. for the costs—held the promise to be within the statute of frauds, not being in writing and void for want of consideration.

This case came before the Circuit Court on an appeal from a Justice's Judgment, which that Court affirmed.—The case was this—The plaintiff had obtained a judgment in the common Pleas against one William Southerland,

and had lodged his execution in the office of the Sheriff Becket, who was about to proceed on the execution, when defendant told him, (Becket) that if he would not *push* the execution he (defendant) would pay the costs. In consequence of which Becket did not proceed. The plaintiff brought this suit to recover those costs; and the Justice awarded judgment for the amount, and on appeal to the Circuit Court it was confirmed, and this was a motion to reverse that judgment on the ground that the defendant's promise was void under the statute of frauds, not having been made in writing.

Gregg, for the motion, cited *Fell* on Mercantile Guaranties, 10, 16. To constitute a sufficient consideration the original debt must be discharged.

O'Hanlon, contra.

CURIA per JOHNSON, J. The statute provides that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; unless the agreement upon which such action is brought or some memorandum or note thereof be in writing and signed by the party to be charged therewith. &c.

The cases involving the construction of this clause of the statute are very numerous and some of the distinctions are very subtle and refined. But the broad rule on which they all proceed, is that when the undertaking is original, it is binding although it is not in writing and although it may have grown out of a debt, &c. of another, but otherwise when it is collateral to the liability of another. A few examples will be sufficient to shew its application to the case under consideration. In the case of *Williams vs. Leper*, 3 Bur. 1885, is an example falling within the first of these classes. One Taylor being indebted to the plaintiff for rent in arrear, and being insolvent, made a conveyance of all his effects for the bene-

fit of his creditors. The defendant was employed to sell the goods as a broker, and on the morning on which they were to be sold plaintiff went to the house to distrain them and the defendant then promised to pay the rent if he would forbear to distrain. Lord Mansfield said the case had nothing to do with the statute of frauds, and all the Court agreed that this was an original and not a collateral undertaking, and that defendant was bound. So in *Reed vs. Nash*, 1 Wils. 305, the Court held that the defendant was bound by his promise although not in writing, to pay to plaintiff £50 and the costs of an action brought by the plaintiff against one Johnson for an assault and battery in consideration that the plaintiff would withdraw that action; for the withdrawing of the action was a good consideration to support the promise.

But in the case of *Fish vs. Hutchinson*, 2 Wils. 94 the Court held that a promise made by the defendant to pay the plaintiff the amount of money owing to him by one Vickers on consideration that he would stay an action that he had brought against him was within the statute and void; for, say the Court, here is a debt of another person subsisting, and a promise to pay it. The original debtor remained liable, for the plaintiff might, notwithstanding, have proceeded with his action. The undertaking was therefore collateral and according to the rule void.

The case under consideration falls so immediately within the principle of the last case, that a further illustration is deemed unnecessary. Assuming that this was a contract made between the parties and the promise made to the plaintiff, it was a contract to pay the debt of another without any consideration. The defendant was not to be benefitted by it, nor the plaintiff prejudiced or delayed. It was not a satisfaction of the execution pro tanto, nor did the plaintiff lose his lien on the estate and effects of

Southerland and he might have proceeded on his execution at the instant. The terms of the contract did not itself impose any delay or even forbearance. It was therefore in this view clearly a collateral undertaking, and void under the statute. But the case itself is still stronger. The promise was to the Sheriff, and he had no authority under his general powers to compromit the plaintiff's rights by such an arrangement, supposing it to have been legal to have substituted in the place of an execution the naked promise of a stranger. The motion is granted.

Judgment arrested.

COVINGTON VS. BUSSEY,

An agent authorized to settle an account, and to give a note in the name of the principal for the balance, is a competent witness to prove his agency and the fact of giving the note, where suit is brought on the note.

Assumpsit on a Promissory Note, purporting to be drawn by Jer. H. Bussy, the defendant's intestate and payable to plaintiff. The signature to the note was in the hand writing of John R. Barton, who was called as a witness to prove the execution of the note. He stated that defendant's intestate had purchased a tract of land of plaintiff; that contemplating a visit to Alabama, the intestate had instructed the witness to make a settlement with the plaintiff as to all their dealings, and stated to him that he would find all the necessary vouchers in the hands of Benj. Hightower to enable him to do so. That he applied to Hightower, procured the vouchers, and made the settlement; and this note was given for the balance.

He proved, also, that he was instructed to give a note for the balance that might be found due, and to accept and receive titles for the land, and that he did so, and on the

return of defendant's intestate, he reported to him what he had done, and that he approved of it.

Bauskett, for defendant, objected that Barton was an incompetent witness to prove the fact of his agency.— The objection was overruled, and a verdict was found for the plaintiff, and the question was now brought before this Court.

CURIA *per* JOHNSON. J. I take the general rule to be, that an agent is admitted *ex necessitate* to prove not only his acts as such, but also the fact of his agency.— But in any view of it, the foundation of the objection was the supposed interest of the witness. In this particular case, the interest of the witness can not be perceived. It was a naked agency. He would not be liable on the note to the plaintiff, because there was no consideration moving him to the execution; nor to the defendant, because, if he acted without authority, the intestate was not bound by it; and how far this might effect his credit, was for the Jury of which the defendant had the full benefit.

New trial refused.

STARR & CLELAND vs. ANN TAYLOR, alias TAYLOR & Co.

No suit can be brought by or against a feme covert sole-trader, unless her husband be joined:

This was a suit by *sum. pro.* brought on a note signed Taylor & Co. against Ann Taylor, a sole-trader, without joining her husband.

The defendant pleaded that she was feme covert, and although a sole-trader, yet that her husband's name should have been joined for conformity sake. The plaintiff replied, that by the Act of Assembly of 1744, (Pub. Laws 190, 2nd Brev. Dig. 348,) it was enacted that a feme

covert, a sole trader, might be sued as a feme sole, without joining her husband.

GAILLARD, J. presiding, overruled the objection of the defendant, and gave a decree for the plaintiff on the ground that the Act of Assembly (Pub. Laws 190, 2nd Brev. Dig. 348) expressly authorized suits to be brought against feme coverts, sole-traders, without joining the husband.

M'Cord, for the defendant, appealed on the ground that the husband should have been joined. That neither at common law, nor by the statute, could a feme covert, sole trader, sue or be sued, unless the husband's name is added for conformity sake. By the act of 1744, Pub. Laws 190, the husband is required to be joined. In *M'Dowald & wife vs. Woods & wife*, 2 Nott & M'Cord, 242, Judge Nott recognizes the rule to be the same as in *Marshall vs. Rutton*, 8 T.R. 545; and in *Wardell vs. Gouch*, 7 East, 582. The act of 1744, is referred to by Judge Nott, so that he had that act in view when he said the husband must be joined. In *Lavie vs. Philips*, 3 Burr 1776, it is said—By the custom of London, a wife sole trader, is authorized to sue and be sued alone, yet the husband must join for *conformity sake*, 1776–7–8, 1780.

Scott, contra. The husband is only required to be joined where she sues, not where she is sued.

CURIA *per* COLCOCK, J. The clause of our act is in the following words: "That any feme covert being a sole trader in this province, shall be liable to any suit or action to be brought against her for any debt contracted as a sole trader, and shall also have full power and authority to sue for and recover, naming the husband for conformity, from any person whatsoever, all such debts as have or shall be contracted with her as a sole trader. And that all proceedings to judgment and execution, by or against such feme covert, being a sole trader, shall be as if such woman was sole and not under coverture, any law or

custom to the contrary thereof in anywise notwithstanding."

If we had no other guide to direct us in this case than the act, the opinion of the presiding Judge might be supported; for it would appear from the construction of the clause, that the joining the husband for conformity relates only to the power which is given to her to sue.— It does seem to have declared in the first part of the clause, that she may be sued for debts contracted as sole trader, without the necessity of the husband being joined. But when we trace this departure from the law, which relates to husband and wife to its source, we cannot but perceive the meaning of the legislature although somewhat ambiguously expressed. This partial dissolution of the contract of marriage originated in a custom of London, and upon turning to the authorities, it will be found to be expressed in language very similar to that of our act, and that even in the city Courts there the husband must be joined, (as it is said for conformity) whether she sue or be sued; and as Lord Eldon says, in the case of *Beard & Webb*, 2d Bos. & Pul. 99, it will be difficult to shew that the right to sue, and the liability to be sued, do not stand upon the same footing. In that case, the first question was, whether a feme covert, sole trader in London, is liable to be sued as such at Westminster, and whether the husband ought not to be joined in the action? On the first, Lord Eldon decides that she could not be sued in that Court; and, on the second, he goes into a most elaborate argument, and refers to all the authorities that can be found on the subject. And, since his decision in that case, which was in 1800, I do not find that the point has been questioned, but seems to be spoken of as settled. In the case of *Moreton vs. Packman*, et. ux. 2 Keble, 583, and 1st. Modern, 26, where a *procedendo* being prayed because the husband was not joined in the

action for ale sold, the Court said "they could not try whether the selling of ale be within the custom," nor will any action lie here against her alone. The last of the older cases referred to, is *Mrs. Rool's*, 11 Mod. 253, where it is observed by the Court, that a feme covert and sole merchant may be sued sole; so may she sue sole for debts owing to her within the city. But, says Lord Eldon, it is to be remarked, that when we meet with the expressions of suing and being sued sole in the older books, they mean nothing more than this: that she may be sued in the manner in which a married woman may be sued, who is answerable without her husband. It does not, therefore, follow that the husband is not to be joined for conformity.

The next case examined by Lord Eldon, is that of *Lavie and another, assignees of Jane Cox vs. Phillips, et. al. assignees of John Cox*, 3 Burr. 1776, the question was, as to the disposition of the wife's goods. But it became necessary to examine into the custom, and it is said to have been stated from the liber albus, which alleges that if the husband and wife shall be impleaded, in such case, the wife shall plead as a feme sole; the custom therefore supposes the husband to be joined in the action, and I understand that in practice this is invariably observed as to all acts before the plea. The question was argued by the late Lord Chief Justice Eyre, then Recorder of London, who seems to have had no conception that an action could be maintained by the city Courts, unless the husband was joined for conformity. Mr. Dunning, who argued the case on the other side, put the right of suing, and the liability to be sued as a sole merchant, upon the same footing.

The next case examined, and the last which I shall notice, is that of *Caudell vs. Shaw*, 4 Term Rep. 361. The objection to the judgment was, that the husband ought

to have been impleaded jointly with the wife, though execution must be against the wife only. Lord Mansfield says, it is an application to set aside a judgment entered up *without* authority, and Mr. Justice Aston says, by better authority, it seems, the action ought to be brought in the city Courts, and the husband ought to be joined. It is a principle of the common law, that a woman shall never be put to answer without her husband. In this elaborate opinion, Lord Eldon adverts to what may be considered as the only argument against this rule of law, which is, that it is absurd to join a party in an action against whom there can be no judgment. But he says the question is, whether upon the authority of this single dictum we are to overturn the series of decisions which I have traced from 1st. Edw. —, to the present day.— He concludes by examining some cases of settlements, in which there appear to have been some doubts at least, entertained on this point. But the case of *Marshall vs. Rutton*, 8 Term Rep. 545, had not been at this time decided, but was pending before the twelve Judges, in which it is decided that a feme covert cannot contract and be sued as a feme sole, even though she be living apart from her husband, having a separate maintenance secured to her by deed.

I am of opinion, therefore, that when the legislature introduced by act this custom of London, they meant to introduce it as practised there ; and I feel no disposition, nor do I think it comports with the sacred contract of marriage, or the good of the community, to extend this partial dissolution of the husbands authority over the wife, and to subject her to be torn from her family by the rude hands of unfeeling bailiffs, at a moment when, perhaps, they may most need her assistance.

Motion granted.

RANDOLPH GEIGER & ELIZABETH GEIGER VS. THOMAS J. BROWN.

Bequest to testator's wife of negroes, named. "Item. I bequeath to my wife one sorrel mare, one brown cow. Item. All my household furniture, and the increase of the said negroes during her natural!" Held that the legatee only took a life estate in the negroes; the word "life" being clearly omitted, and all the sentences considered as one clause.

Where the testator gave a life estate to his wife of certain negroes, and then says "to my son R. G. I bequeath all my lands, &c. and my four negroes, Jim and Tom, with the *remainder of my personal estate*, shall be kept together for the use and maintenance of my children." Held that this residuary bequest did not include the remainder after the life estate in the negroes given to the wife.

This was an action of trover for the conversion of a negro slave Lucy, and her issue. The plaintiffs claimed, under the will of Harman Geiger, as heirs at law and residuary legatees of the testator. The words of the will were:

"First: I bequeath unto my loving wife, Margaret Geiger, one negro man named Joe; one negro wench named Lucy. Item. I bequeath unto my wife one sorrel mare, Lady, with her saddle and bridle. Item. One brown cow, and one black heifer. Item. All my household furniture, and the increase of the said negroes, *during her natural*. And to my son Randolph Geiger, I bequeath all my lands to him and the heirs of his body; and if he should die without issue, the said land shall be sold, and equally divided between my three daughters, Elizabeth, Ann Magdalen, and Margaret, and my four negroes, Jim and negro Tom, *with the remainder of my personal estate*, shall be kept together for the use and maintaining of my children, till any one of them arrives of age, or is married, and then my personal estate shall be equally divided among my children."

The defendant claimed as purchaser from one Slappy, who intermarried with the widow of the testator, Mar-

garet Geiger. The questions made were, whether Margaret took a life estate in the negroes, or a fee simple; and whether the executors or administrators of the testator, Harman Geiger, should not have sued, instead of the plaintiff.

A motion was made for a nonsuit before Mr. Justice Gantt, who tried the cause, which he refused, and the Jury found a verdict for the plaintiff, and the defendant now renewed his motion for a nonsuit before this Court.

Pope & Caldwell, for the motion.

Butler, contra.

COLCOCK, J. In this case I shall not pursue the order of the brief, for the whole case turns on the construction of the will; and the first question which arises in the construction of the will, is, whether the four first sentences are to be considered as one clause, or to be taken as separate and independent clauses. The words are, "I bequeath unto my loving wife, Margaret Geiger, one negro boy named Joe, one negro wench named Lucy. Item. I bequeath unto my wife, one sorrel mare named Lady, with her saddle and bridle. Item. One brown cow and one black heifer. Item. All my household furniture and the increase of the said negroes during her natural, &c." The word life is clearly omitted in the last part of the clause. If the whole be taken as one clause, then it is clear that the limitation applies to the negroes. If not, it is contended that it applies only to the furniture, and the increase of the negroes which are mentioned in the last sentence. On this part of the case, I entertain no doubt but that all the sentences are to be taken together and constitute one clause, and that it was the intention of the testator, and that he has effected that intention by giving to his wife a life estate and no more. In short, that the words of limitation will apply to all the property contained in the several sentences, and be operative as

far as the nature of the property given will permit. If, as it is contended by the counsel for the defendant, the testator intended by the first sentence, to give the negroes, absolutely, where was the necessity of saying any thing about the increase? for that would have passed of course with the negroes, and she would have had them during her natural life, and afterwards too,—that is, a right to dispose of them. We decided a case not long since, which was in this particular, exactly like the case before us, in which we determined that sentences thus connected, were to be taken together as constituting one clause.

The next question is not so free from doubt, though on an attentive examination of the cases, I think the principle clearly laid down in all of them, is, that although the word *remainder* may be in itself sufficiently comprehensive to embrace any reversionary interest, yet we are to consult the whole will, and ascertain if such was the intention of the testator. If, by giving it such a construction as to pass all or any particular reversionary interest there will be a clashing of interests among the devisees or legatees, that in such case it is clear that the testator did not intend it so to operate; or if from the words following, its general and comprehensive meaning and operation is restricted, that then it must be so confined in its operation.—Now the words here used are, “and my four other negroes (by name) with all the remainder of my personal estate, shall be kept together for the use and maintaining of my children, till one of them arrives to age, or is married, and then to be equally divided.” It is clear, from these provisions, that the testator meant the remainder of the property which he had in possession, and not any future contingent interest; and it would be straining the construction to extend it to the reversionary interest which would be left after the death of the wife. Again,

although he could not tell with certainty that his wife would live till his eldest child came of age, yet he must have known that such an event might occur, as it did, and he could not have intended that the division of that interest should take place in the life time of his wife ; for that would have terminated her interest, if it could have been done. He could not have contemplated the division of an interest which might not, and did not, fall in before the time of distribution. It is presumable he did not think it necessary to provide for it at all, as it would by the law go to his children at the death of his wife.

The case which bears the strongest analogy to the one before us in principle, is that of *Goodwright, ex dem. of the Earl of Buckinghamshire vs. the Marquis of Devonshire and wife*. With the exception as to the generality of the language used after the word residue, "whatsoever and wheresoever," the principles applicable to the case before us, are more fully discussed and the cases reviewed, than in any other to which we have been referred ; it is, therefore, the only one to which I shall directly refer for support of the positions I have laid down, though in that case the interest did not pass.

In the argument of the defendant's counsel, commenting on the case of *Freeman vs. Duke of Chandos*, he says, "the words in the first limitation to his wife are sufficient to include the reversion, provided an intention to pass it be manifest, yet those words seem rather to describe *estates* in possession ;" and Lord Alvanley, in delivering the opinion of the Court, says, "it was admitted that it was necessary to shew that it would be inconsistent with the general intent of the testator, and the particular provisions of the will to impute to the testator any intention to convey (the property in dispute) his mind need not have been active if he did not know he had it. Still it would pass, provided he did not mean to exclude

it." In the first part of this quotation, the principle applicable to this case is expressly recognized, though the latter part of the sentence, I confess is somewhat unintelligible to me. For if he did not know that he had the interest, I am at a loss to conceive how he could be supposed to have had any intention about it either one way or the other.

In commenting on the case of Strong & Treat, he observes that Lord Mansfield said in that case, (which was afterwards confirmed in the House of Lords,) the generality of the expression, "and also all other, the lands, tenements and hereditaments, in the said counties, whereof I am seized in fee, &c." if unrestrained and unqualified by any other words, would carry all the testator's estate in possession, reversion, or remainder. But these general words may, by other words and expressions in the will, be restrained to any of them, and it is the same thing, whether it be directly expressed, or clearly and plainly to be collected from the will, and he then concludes. "Here are plain expressions which are fully sufficient to shew that the testator did not intend to devise the reversion of the settled estate." And Lord Alvanley then concludes *his opinion* by saying, the question then is, whether it appears from any particular clause of the will, or from the general intent of the testator manifested in the will, that it would be inconsistent with the other part of the will to permit the residuary clause to take effect? And I am decidedly of opinion, that in this case there is such a restriction upon the word in the particular clause, and such inconsistency in the other provisions of the will, as wholly to exclude all intention on the part of the testator, and to prevent the general operation of the word remainder to pass the revisionary interest. This view of the subject renders it unnecessary to take notice of the other grounds relied on, for it was con-

ceded by the defendant's counsel, (and very properly conceded,) that if the testator had not disposed of this reversionary interest, but died intestate as to it, that the action could not be maintained except by the executor, if he be alive, or by an administrator duly appointed. The motion for a nonsuit is therefore granted.

Nonsuit granted.

The statute of limitations will not commence to run before administration taken out.

This case now came up to this Court again on the part of the administrator of Harman Geiger. Harman Geiger died about the year 1778, or 1779. Two executors were named to his will, both of whom died many years ago.— It did not appear that the surviving executor left an executor. The tenant for life, the widow, died on the 17th August, 1822, and the preceding suit on the part of the surviving son and daughter of the testator having failed, Randolph Geiger, the son, took out administration on his father's estate on the 1st July, 1827, and on the 17th Sept. 1827, commenced this action. The defendant moved for a nonsuit, on the ground that the action should have been brought by the executors of the testator, or by the executor of the surviving executor; and that the plaintiff was barred by the statute of limitations.

HUGER, J. who tried the cause, refused the motion on the grounds, that the length of time, and the fact that administration had been granted by the ordinary, were sufficient to rebut the presumption that there was an executor to the surviving executor; and that the statutes could not commence to run until administration taken out.

The Jury found a verdict for the plaintiff, and the case was now brought up to this Court, and the point made.

1st. Whether the statute of limitations could commence running before administration.

2nd. Whether the tenant for life of personal property was not entitled to the fee simple; or whether there could be such a thing as a remainder or reversion of personal property after a gift for life in the same chattel?

CURIA per COLCOCK, J. The rights of these parties depend on the construction of Harman Geiger's will. An action was commenced by the surviving children of Geiger against the defendant, in which it was decided by this Court, that the testator had died intestate as to the reversionary interest in the negroes now in dispute, and that, therefore, an administration must be taken out to enable them to recover from the defendant, who had refused to deliver them. This has been done, and on the trial below it was contended on behalf of the defendant that the plaintiff was barred by the statute of limitations—that old Mrs. Geiger, who afterwards married one Slappy, and to whom the negroes had been bequeathed for life, died on the 22d June, 1822, and that administration was not granted until 17th August, 1827.—So that more than four years had elapsed after the death of the tenant for life, before action brought; and, further, that the plaintiff was not entitled to recover the full value of the negroes, because the wife of Slappy, who sold these negroes, was entitled to a portion of this reversionary interest, which of course belongs to the defendant.—So that if the statute began to run from the death of the tenant for life, the plaintiff is barred. If, from the time the administration was granted, then he is not barred.

While on the one hand it is the duty of the Court to give full operation to the statute of limitations in those cases in which it clearly applies, it is on the other equally their duty to prevent its application to cases not embraced within its letter or spirit. It has well been called a statute of repose, and to give full effect to its sedative power, it has been determined that when it once

begins to run, it shall continue its course, notwithstanding any supervening disabilities, and this has been the uniform course of decision in our Courts; and it not unfrequently occurs that great injustice is done by giving this sweeping effect, as preventing the recovery of a debt which the Court sees clearly is still due; but we should never be unmindful that it is in derogation of the common law, and should not be strained in its operation, so as to embrace cases never intended to be effected by it. Its operation, by the terms of the act, commences from the cause of action, that is when the action accrues. If there be no legal representative of an estate to enforce its claim to personal property, the action cannot be said to have accrued; or if there be a cause of action, to whose benefit could it accrue? But still further: If the property be rightfully in the possession of a person who is answerable for it to the real owner, or interested in it, there can be no cause of action until one who is clothed with legal authority to demand and receive it shall make claim; for being rightfully in possession, there can be no conversion until there be a refusal to deliver it up, or a direct appropriation of it to the holders own and exclusive use or benefit. In this case, it is said to be a great hardship to suffer the property to be taken from the defendant after a possession of so many years; but the fact that it was given to a person for life who has lived to an extraordinary old age should not be lost sight of. The tenant for life died in 1822—the property was immediately demanded and a suit commenced, but by those who had no legal authority to sue. As soon as that was decided, administration was immediately taken out and this action commenced. Among a number of authorities relied on by the counsel for defendants, establishing positions which cannot be controverted, was one on which they greatly relied, contending that the language of the Court in it was peculiarly

applicable in this case—it is the case of Nicks and Martindale, in which the Court observe, that if the parties interested should neglect to take out administration, claims might be kept alive contrary to the policy of the act. But that was said in relation to cases not of the kind of that under consideration—cases where the statute had commenced its operation; for in cases like the present, one party is as much in fault as the other. The defendant, by applying for administration might have obtained it, or compelled those better entitled to interpose their claim. I should, without the aid of authority, have come to the conclusion that in this case the statute could not operate as a bar. But I am, nevertheless, happy to have the support of the highest authority. The point was expressly settled in the case of the administrator of Kennedy vs. Edwards; and so in the case of Curry and Stephenson, which in principle (as correctly reported in 555 Skinner) is directly in point. The case is thus stated; that A. receives the money of a person who afterwards dies intestate, and to whom B. takes out administration, and brings his action against A, to which he pleads the statute of limitations, and the plaintiff replies and shews that administration was committed to him which was *infra sex annos*, though six years are expired since the receipt of the money, yet not being so since the administration committed, the action is not barred by the statute; but it is clear, that if the money had been received in the life time of the intestate he would have been entitled to his action, and the statute would have begun its course; therefore, it is apparent that the money was received after the death of the intestate, as reported by Skinner; and this is clear, because the case was decided on the authority of Stanford's case, cited in Jeffries' case, Cro. Jas. 60, 61. And in Stanford's case the fine was not levied until after the death of the intestate.

Motion refused.

SAME VS. SAME.

Where the testator bequeaths slaves to a tenant for life, without any further or other disposition of the slaves, they revert upon the death of the tenant for life to the testators legal representatives.

The Court not having expressed any further opinion as to the reversionary interest of the Plaintiff in the negroes, after the death of the tenant for life, at the request of Counsel, they now heard that point re-argued.

The point was very ably argued by *Job Johnston*, for the defendant, and by *Bauskett & Dunlap*, for the plaintiffs; but as the Reporter did not hear the argument, he can make no statement of it.

CURIA *per* COLCOCK, J. In this case the Court indulged the learned Counsel in the re-argument of some of the points which had been determined on this very will, and in relation to the same subject; that is, to four of the negroes the issue of Lucy, the title to which was precisely the same as that of the slaves in the former suit. But as we have not been induced to change our opinion as formerly expressed, it would be a work of supererogation to go into any further or other reasoning than that which is contained in that opinion; we still think that a life estate only was given, and that the reversionary interest after the determination of the life estate did not pass by the residuary clause, and we also think that the Statute of limitations must operate.

But a new point was made which demands some attention. It is contended that although the property is given for life, that yet as it was a gift of personal property, it was an absolute gift or must so legally operate. This is a doctrine which I take it is now as well settled as any which has come before us at this sitting, at least it is so as it regards negroes, which are the subject of the present dispute—that they may be limited over after the determination of a life estate has been decided a thousand times. And if so, it follows as a matter of course that a

reversionary interest may be created, or exist. Once admit the doctrine of creating different estates in a chattel and it follows as the shadow follows the substance that there must be in some cases and under some circumstances a reverter to the representative of the donor. If you admit the idea that a gift for life of a chattel is good to support a remainder, why not to support a reversion? And there is scarcely a book which treats upon the subject, which does not shew that the old distinction in this respect is done away with in the gradual progress of this doctrine. A distinction was first made between the use of the thing and the thing itself. But this distinction was soon found to be too ethereal for the practical purposes of life, and as personal property became more valuable and a description of it introduced among us more durable and continuing in its nature, it was at length abolished, and now it is clear that, at least as regards chattels, which are durable in their nature, any such contingent interest may be created which can be in real estate. And notwithstanding the strong language of the counsel to the contrary, this is supported by even the English authorities. What is a term of years but a chattel? To be sure technically called a chattel real, a chattel durable in its nature. Now as to these Mr. Fearne expressly says, that when granted for life they may on the death of the tenant for life revert to the representatives of the donor. See pages 486-488, where he puts the case thus: Where A. possessed of a term for 99 years, devised it to B. for life, and then to C. for life, and so on to five others successively for life.—After the death of all, upon the question, who should have the residue of the term, it was adjudged to revert to the executors of the testator. The motion is dismissed.

New trial refused.

V. BROWN vs. E. D. KILLINGSWORTH.

A feme covert, though living apart from her husband on her separate estate, cannot be sued without joining the husband.

Where the husband has abjured the realm, the wife is considered as a feme sole, and may sue and be sued alone.

This was an action on a note of hand given by the defendant. Her counsel objected that she was a married woman, her husband now residing in the same district. The plaintiff then shewed that defendant and her husband had separated and had lived apart, and continued to do so when the note was given, and that she had a separate estate independent of her husband; that she lived on her separate estate and had the controul of her plantation and negroes, and made all contracts necessary in her business; that the note was given for lumber purchased for and used on the plantation. It did not appear that there had been any deed of separation between them.

The defendants attorney moved for a nonsuit, which was ordered.

Chappell, now moved to set aside the nonsuit, and cited *Corbet vs. Poelnitz*, 1 D. & E. 5.

J. L. Clarke, contra, cited *Marshall vs. Rutton*, 8 D. & E. 545.

CURIA per NOTT, J. This has been a very vexatious question in England, and one on which very contradictory opinions have been entertained. It seems to be admitted that where the husband has abjured the realm (as it is called) he is considered as if civilly dead and the wife will be considered as a feme sole and may sue and be sued as such. Clancy, from pages 7 to 14. The same doctrine will also be found to be recognized in several other authorities to which I shall have occasion to refer. And upon that principle this Court in the case of *Alexander Beau vs. Elizabeth Morgan*, where the husband had left the country under circumstances which furnished

strong reasons to believe that he had abandoned his wife and never intended to return and where he had not been heard of for six or seven years, held that the wife might be considered as a feme sole and was able to contract and to sue, and liable to be sued as such. And that is as far I believe as any of the decisions in this State have gone,

In the case of *Corbet vs. Poelnitz*, 1 D. & E. 5, the Court of King's Bench held that "a feme covert living apart from her husband and having a separate maintenance, may contract and sue and be sued as a feme sole;" Lord Mansfield considered her in the same situation as if the husband had been in exile, or had abjured the realm. *Ringstead vs. Lady Lanesborough*, Lawes on Plead. 552; *Barewell vs. Brooks*, *ib.* 60. Judge Rives in his treatise on domestic relations, has reviewed all the decisions on the subject, and has gone into an elaborate defence of the case of *Corbet and Poelnitz*. And the conclusion to which he has arrived at, is, that where the husband and wife live apart, and the wife has a separate estate and maintenance she is liable as a feme sole; Domestic Rel. C. 8, p. 39. But even those cases do not support the principle now contended for, because the wife in this case had no separate estate and settlement although she was abandoned by her husband and permitted to enjoy some separate property.

The doctrine has since undergone a more thorough discussion in the case of *Marshall and Rutton*, 8 D. & E. 545, and several other cases in the English Courts. The case of *Marshall and Rutton* on account of the importance of the question was argued before all the Judges of England; and the conclusion to which that Court unanimously arrived at, was, that "a feme covert cannot contract and sue and be sued as a feme sole even though she be living apart from her husband, having a separate maintenance by deed." See also *Marshall vs. Hutchison*, 2 B.

& P. Days Edit. 226, where a great variety of cases are referred to, on the subject, and *Bogget vs. Frier*, and another, 11 East., Day's Edition, 307, and the cases there cited, from all of which it will appear that the case of *Marshall and Rutton* is now considered as the settled law in England. It would seem from the case of *Walford vs. the Duchess De Pienne*, 2 Esp R. 554, and the cases there referred to, that, in the case of an alien, the law may be otherwise. But there is no case where the husband and wife are living in the same state, the wife having no separate estate secured to her by deed, that she has been considered as able to contract, and to sue and be sued as a feme sole. I concur, therefore, in opinion with the presiding Judge, and think this motion ought to be refused.

Nonsuit affirmed.

CLINE VS. BLACK.

An instrument to convey a freehold must be under seal.
 An agreement purporting to be between two parties is void, unless signed by both.
 Covenant on the part of a lessee to keep the house in good repair, if the house is destroyed by fire, he must rebuild; and if the lessee stands by and permits the landlord to rebuild for his own benefit and sets up no claim, it is an abandonment of all claim on his part.

This was an action to try titles to an unexpired term in a house and lot in the town of Columbia. The plaintiff set up a title to it under the following writing, signed by the defendant, viz:—"South Carolina, Richland District, Columbia, Nov 9th, 1822. Articles of agreement entered into between John Black, of the one part, and William Cline, on the other. The said John Black doth give the house and lot adjoining his own up to William Cline, free of all rents, tax, or expense of any kind, only that the said William Cline shall keep the house and ten-

ement in good repair. I, John Black, do bind my heirs, administrators, or assigns, to let the said William Cline live in said house as long as my daughter Jane shall live, or until my youngest child is of age. (Signed,) John Black. Witness, (signed,) D. E. Sweney, Cha's. L. Cline."

The plaintiff had married the defendant's daughter, and immediately after the execution of this writing he went into possession of the house, and remained there until it was burnt, about two years after, and had in the mean time incurred some expenses in repairs. After it was burnt, the defendant built another house on the same lot, to recover possession of which was the object of the present action.

M'Cord, for the defendant, moved for a nonsuit, on the ground that the instrument under which the plaintiff claimed, purported to convey a freehold, and therefore should have been under seal.

GAILLARD, J. who presided, granted the nonsuit.

M'Clintock, for the plaintiff, appealed, and moved to set aside the nonsuit. This instrument has two periods of limitation—the life of Mrs. Cline, and the coming of age of the youngest daughter. If one make a lease for twenty-one years, if the lessee shall so long live; this is a good lease for years, and a certainty in an uncertainty.—1 Inst. 46. A deed is to be taken strongly against the grantor, and if it can enure in different ways, the grantee may take it in such a way as shall be most advantageous to him. *Jackson vs. Blodget*, 16 Johns. 172; 8 John. 381.

M'Cord contra. The instrument purports to be made by both parties, but is only signed by one. It is imperfect. Besides there was no consideration, and therefore as a contract, not obligatory on Black. It purports to convey a lease for life, which is a freehold, and therefore should have been under seal. Livery of seizin could only

be made by deed, under seal, with two witnesses—Jacob L. D. Tit. Lease. 1 Sullivan's Lectures, 140 to 144; Plow. 421, 422, 438; Cr. Eliz. 560; 1 Cruise, 82; 3 Dallas, 486. All writings not under seal are parol contracts. Rann vs. Hughes, 4 T. R. 347. But a parol gift of lands creates only a tenancy at will. 1 Johns. Cases, 33; 1 Church's Dig. 485, Tit. Gift. Tit. Ejectment, Sec. 6.—Only a term for years is good without a seal. Roberts on Frauds, 246, 248. The Act of 1785, (Pub. Laws, 381, sec. 45; Griffith's L. R. 833,) requires all transfers of real property for life, or a greater estate to be written, signed, *sealed*, and recorded, or the deed shall be void; and no such deed shall be admitted to be recorded, unless acknowledged by the grantor, or proof of the signing, sealing, and delivery thereof, be made in open Court, by the oath of two credible witnesses.—The act of 1788, (Pub. Laws 453, Sec. 1,) admits the deed to be proved out of Court by the *subscribing* witness making the usual oath of the execution of the deed. Besides, upon the covenant to repair, the lessee was bound to repair upon the burning of the house. 4 Dane's Dig. 375; Bullock vs. Dommitt, 6, D. & E. 650; 2 Saund. 422, a. and note (2.) Plaintiff stood by and saw the defendant rebuild the house. It was an abandonment of all claim.

CURIA *per* JOHNSON, J. A variety of grounds have been urged on the argument, especially in the opposition, and it would have afforded me pleasure to have followed the counsel through them all, if the press of other matters of equal importance had admitted of it; but the justice, as well as the law of the case, is so clearly with the defendant that it is deemed unnecessary.

The plaintiff claims under an instrument which purports to be an agreement between two parties, and is signed by only one, and is without seal, or consideration. The house,

the only thing of value connected with the premises, was accidentally destroyed by fire. The plaintiff, by the terms of the instrument, was bound to repair, but he neglected to do so, and the place became derelict, and he stood by when the defendant erected on the lot an extensive and valuable building without making any objection, which last circumstance according to the case of *Tarrant vs. Terry*, 1 Bay, 238, was in itself a sufficient bar to his recovery; and upon the whole, I scarcely recollect a case in which there were so many well founded objections to the plaintiff's right of recovery. The motion is refused.

Nonsuit sustained.

The Commissioner in Equity vs. W. THOMPSON.

Where the defendant bought at the sale of the Commissioner in Equity a tract of land sold for the purposes of a division, and described as "all that tract said to contain 449 acres, more or less, situate, lying and being, &c. &c. it was held that the purchaser could not set up by way of discount to a suit on his note given for the purchase money, that upon a re-survey there was a deficiency of 29 acres.

There is no implied warranty at the sale of a public officer and no deduction will be allowed for a deficiency, unless it amounts to a failure of consideration, or defeats the great object of the purchaser, or furnishes satisfactory evidence of a total mistake in the character of the land.

Where a tract of land is sold in gross, and the number of acres mentioned merely as a part of the description, without any warranty or representation by which the purchaser is misled, no deduction pro tanto, will be allowed for a deficiency of acres.

Too easy an ear should not be lent to defences of this sort in cases of public sales.

This was an action of assumpsit on a promissory note given by defendant for the purchase of a tract of land sold by plaintiff under the order of the Court of Equity to effect partition among the heirs of Thomas Cobb, deceased.—The defence was, deficiency in the number of acres sold. The deed from plaintiff to defendant described the land

as "all that tract of land *said* to contain 449½ acres, more or less, situate lying and being on Wilson and Ninety Six Creeks, waters of Saluda River, and bounding on the E. and N. by Saml. Wardlesworth and on the W. and S. by Larkin Griffin and Saml. Wardlesworth." Upon a re-survey it was found to contain only 420 acres included within the metes and bounds. The land was not sold by plaintiff according to any plat. It was admitted by the Commissioner that six acres had been sold to a former purchaser. The auctioneer was interrogated whether the land was sold in gross or for a particular number of acres, but the testimony was rejected by the Court on the ground that the deed contained the best evidence of the vendors' representations.

The jury under the charge of Mr. Justice GANTT, found a verdict allowing defendant a rateable deduction for 29½ acres.

The plaintiff now moved for a new trial on the grounds That there was no misrepresentation at the sale.

That the deed contains no warranty of the number of acres, and evidently shows that the land was sold in gross, without minute regard to the quantity.

That the Court refused to receive the testimony of the auctioneer as to the terms published at the sale.

Wardlaw, for the motion, cited *Barkley vs. Barkley*, Harper's L. R. 441. *Barksdale vs. Toomer*, Harper 290. *Taylor vs. Partridge*, decided at Columbia.

CURIA *per* NOTT, J. The land in question was sold by the Commissioner in Equity pursuant to an order of that Court, and I take it to be a well settled rule that the law never implies a warranty on the part of any person acting merely as its organ for the purpose of transferring property from one hand to another. A public officer is never liable under such circumstances unless he makes himself so by an express warranty, which he is never required to

make, or by some misrepresentation, as where both parties are misled by an intentional misrepresentation or mistake. Such was the case of the *State vs. Gaillard and others*, 2 Bay's Rep. 11. That was an action of debt on a bond given to the State for lands sold by the Commissioner of forfeited estates under the confiscation act.— It appeared that at the sale a plat was produced which the Commissioner supposed to be correct, that represented the tract of land to contain five hundred acres more than were included in the grant and to contain a valuable mill seat, which was equally untrue and which was the principal object of the purchase. The Court held that such a misrepresentation furnished a good ground of defence, either for a deduction or for a rescission of the contract. So in the case of *Tunno and Fludd*, 1 M'Cord, 121, where a plat was exhibited at the time of sale representing the tract of land as containing 547 acres, which upon re-survey was found to contain only 460, the surveyor having made a mistake in the length of some of the lines, the Court allowed a deduction to be made pro tanto on account of the misrepresentation, although the land was sold by the Commissioner in Equity under an order of that Court; but I do not think that such a defence has ever been sustained where the land was sold in gross and the number of acres mentioned merely as a part of the description, without any warranty or representation by which the purchaser has been misled. The description of the land in this case is "a tract or plantation of land *said* to contain four hundred and forty nine acres more or less." The situation of the land was truly described, but no such description of the precise number of acres was given as was calculated to deceive the purchaser. The quantity was hypothetically represented and the purchaser left to obtain such further information on the subject as he might think necessary. I

am of opinion therefore that he must have purchased at his own risk. If the deficiency had been so great as to have amounted to a failure of consideration or to have defeated the great object of the purchaser, or to have furnished clear and satisfactory evidence of a total mistake in the character of the land I think the defendant would have been entitled to relief. But none of those grounds exist in this case.

There are other reasons why too easy an ear ought not to be lent to a defence of this sort in cases of public sales. In the first place the officer selling is not supposed to be better acquainted with the property than the purchaser, and in most cases not so well, having neither the means nor the inducement to obtain such information. Secondly, property thus sold is most frequent for the benefit of families, many of whom are minors, and who therefore receive their proportions as the installments become due where the payments are made in that way which is most usually required. The elder distributees therefore who receive the dividends out of the cash payments, receive their full proportions, while the whole loss by subsequent deductions may fall altogether upon those who are the least able to sustain it. There is another reason for not favouring such a defence. It is not unusual to see a good deal of competition at such sales. A deduction, therefore, afterwards made is not unfrequently allowed to the last bidder, which another perhaps might not have required. I think that the jury might have allowed a deduction for the part of the land which had been previously sold. But beyond that I am of opinion they ought not to have gone. A new trial must therefore be granted.

New trial granted.

BANK OF THE STATE OF SOUTH-CAROLINA vs. JOHN M'WILLIE and others.

Where several gave a joint Power of Attorney to their Agent to renew a note they had in Bank, as Indorsers, the renewed note must be made in conformity with the original note, as to the order of indorsements, or the Agent will be considered as having exceeded his power.

But, quere.—How far is one Indorser answerable over to another on an accommodation note, for the benefit of the drawer?

This was an action of assumpsit brought jointly against the defendants as Indorsers of a note of one Simon Beckham, drawn and indorsed by Samuel Green, as attorney for the parties to the note, and intended as a renewal of a note formerly indorsed by the parties and discounted at the Bank. The original note was signed by Simon Beckham, and payable to John M'Willie, and by him and the other defendants indorsed, successively. The Power of Attorney was to sign renewals. It was proved by Dr. Green, that the first note was an accommodation note, and discounted for the benefit of the drawer, Simon Beckham.

His honour, Judge HUGER, nonsuited the plaintiff because the note (a renewal) on which this action was brought, was not drawn in conformity with the Power of Attorney, the names of the indorsers not having been signed in the same order.

Evans, for the plaintiff, appealed, and moved to set aside the nonsuit on the grounds, that although the agent had departed from the form of the original note, he had not varied the liability of the parties to the Bank, or to each other, and he argued that the indorsers to an accommodation note were jointly liable, if not paid by the drawer.

Miller, contra.

CURIA *per* COLCOCK, J. We concur with the presiding Judge in this case. The nonsuit was very properly ordered; for the power to renew did not authorize Green

to alter the form of the note, so as to change the respective responsibilities of the parties, which he has most unquestionably done. Chitty, 30 to 37. I do not think that it was ever doubted before, that the indorsers of a note are liable in the order in which they indorse; and that it very often happens that notes are indorsed by a second or third indorser more on the reliance, which is placed on the responsibility of the preceding indorser, than on that of the maker of the note. The motion is dismissed.

Norr, J. I concur with the presiding Judge in this case, that the attorney acted without authority, and therefore the nonsuit was properly granted. But how far one indorser is answerable over to another on an accommodation note, I express no opinion.

JOHNSON, J. concurred with the observations made by Mr. Justice Nott. *Nonsuit confirmed.*

JAMES BOATWRIGHT and others vs. CHRISTIANA FAUST and others.

Previous to the act of 1824, a devise of lands containing no words of perpetuity carried only a life estate.

A subsequent act cannot affect the will of a testator who died before the act was passed.

Burrill Faust by his will devised as follows: "I give my two children Uriah and Sally, the tract of land whereon I now live. I give Sally 140 acres to be laid off at the upper end of the tract adjoining Jasper Faust's land, by a straight line from the river." "I give my son Uriah all my other lands." Uriah Faust died intestate and unmarried. James Boatwright and Elizabeth his wife, and John Glover and Mary his wife, who are both daughters of Burrill Faust, sued for partition of the lands devised to Uriah Faust between and among the heirs of Burrill Faust.

stating that a life estate was only devised to Uriah Faust. The defendants demurred and the demurrer was sustained by Mr. Justice WATIES. The plaintiff appealed and moved to reverse the decision upon the ground that a life estate only was devised to Uriah Faust.

DeSaussure, for the appeal, cited the case of *Hall vs. Goodwyn*, 2 Nott & M'Cord, 383, as having settled the law.

Preston, contra. The old Court of Equity had uniformly held that words of perpetuity or inheritance in a devise of lands were not absolutely necessary to convey a fee simple; *Brailsford vs. Howard*, 2nd *DeSaussure's* Repts. 291; *Frazer vs. Hamilton*, Do, 575; *Whaley vs. Jenkins* 3d Do. 80; *Clark vs. Meeker*, Do. 174; *Waring vs. Middleton*, Do. 264: The same principle was more recently ruled after a very elaborate argument in the case of *Mrs. Clements*, in Charleston, which has not been reported. The constitutional Court in the case of *Hall vs. Goodwyn*, 2nd Nott & M'Cord, 384, established a different rule. Both Courts however, concur in the principle that the manifest intention of the testator is to govern.

To reconcile these contradictory decisions, the Legislature passed the act of 1824, declaring that "every gift of land by devise, shall be construed a gift in fee simple." He considered this act as bearing upon the question in two ways; 1st. As adding authority to the decision of the Court of Equity, by the concurrence of the Legislature, and, 2ndly. As inducing an apparent propriety for deciding a question now taken up, *de novo*, in conformity with what must be the rule of decision hereafter. The question should be regarded as not having been judicially settled, so that if the rule in *Hall* and *Goodwyn* should prevail and be applied to this case, it will be a solitary, unconnected case, having no relation to any thing that had gone before it or can by possibility come after it. In

this will, where the testator derives a life estate, he uses the words "give during her life," shewing that he understood the word *give* to convey a fee simple, and that he thought it necessary to make an express limitation where he intended any thing short of it. He uses the same word *give* where it is clear that he intends a fee simple conditional. He also uses the words *heirs* instead of children, under circumstances in which there is no doubt the Court of Equity would substitute the latter for the former word. The will was obviously the production of a very ignorant man.

Words of perpetuity were by no means so necessary in a *will* as in a deed. 1st Robts. on Wills, 406, note.—

The English construction, as laid down and reprobated by Lord Mansfield in 2nd Doug. 763, is founded upon pure feudal principles, to which our political institutions and our statute of distributions are in direct hostility.— It operated and was intended to operate as a restriction, not, to be sure, upon the power, but upon the *practice* of disposing of estates in derogation of the rights of the heir at law. Our laws promote the distribution of estates, and our rules of construction in conformity with them, should not lean towards the heirs at law and against the devisee, but rather in favor of the devisee.

CURIA *per* NOTT, J. The motion in this case must be granted. There is no principle of law better settled than that previous to our late act of Assembly upon the subject, a devise of lands containing no words of perpetuity carried only a life estate. *No member of this Court ever entertained a different opinion.* Technical words are not necessary. Therefore, where an intention to pass a fee is manifest, that intention will be carried into effect by whatever words it may be expressed. In the case of Hall and Goodwyn, the Court differed about the construction of the will, but not about the rule of law.

In the cases quoted from De Saussure's reports, the Court of Equity appears to have gone great lengths in behalf of devisees, but the Judges always profess to be governed by the intention of the testator. There are no words in this will from which an intention to give a fee can be inferred.

By the act of 1824, it is declared that every gift of land by devise shall be construed a gift in fee simple.—*But that act cannot effect the will now in question, as it was passed since the execution of the will, and even since the death of the testator. It was not the object of the Legislature to reconcile the conflicting decisions on the question but to change the law. The act therefore can only have a prospective operation. The decision must be reversed.*

All the Court concurred.

Judgment reversed.

HALL and others vs. GOODWYN and others.

No words of perpetuity are necessary to a devise of lands to convey a fee simple. The Act of 1824 is a declaratory law, and therefore retrospective in its operation.

This was an action of trespass to try titles. The plaintiffs claimed as heirs at law of William Howell, deceased. The defendants claimed under Robert Howell, a devisee under the will of the said William Howell. If Robert took a fee under the will, the defendants were entitled to recover; if he only took a life estate, the plaintiffs were entitled to recover. The preamble of the will was in these words: "And as touching such worldly estate as it has pleased God to bless me with in this life, I give, demise, and dispose of the same in the following manner and form, after all my just debts are paid," and the devising clause in question was in these words: "I give and

bequeath unto Robert Howell, son of Arthur Howell, deceased, a tract of land containing one hundred acres, on the south-west side of the great lake, where James Anderson formerly lived."

The case came on for trial in the ——— term, 18—, before Mr. Justice Colcock, who, being of opinion that Robert Howell took a fee, ordered a nonsuit. In May term, 1820, the case was argued before the then Court of Appeals in law, at Columbia, on a motion to set aside the nonsuit. That Court did set aside the nonsuit, and declared that Robert only took a life estate, and that the plaintiffs were entitled to recover. See the case as reported in 2 Nott & M'Cord, 383. The case of course went down for trial, and coming on before Mr. Justice Richardson—*Descussure*, for the defendants again moved for a nonsuit, and relied on the act of 1824, which dispenses with the necessity of words of perpetuity, and urged the arguments made by *Preston*, in the case of *Boatwright vs. Faust*, (see the preceding case,) and cited the case of *Dunlap vs. Crawford*, 2 M'Cord's Chancery Reports, 171. The Court, however, refused the motion, on the ground that the point in the case had already been adjudged. The Jury found a verdict for the plaintiff.

Descussure, for the defendants, now appealed, and renewed his motion for a nonsuit on the grounds urged by him before the Circuit Court.

M'Cord, in reply, contended that the cause had been adjudged, and that the judgment of the late Court of Appeals, in this very cause, was final and conclusive upon the parties. Upon the formation of this Court, it had determined in several cases, as in *Raoul vs. Haskell*, *Sumter vs. administrators of Lawson, &c. &c.* that this Court would not revise a decision made by one of the late Courts of Appeal. Their decisions were regarded as the final determination of the matter by a jurisdiction compe-

tent to try the question, and their judgment was as conclusive as if it were the judgment of a foreign Court upon a subject matter properly before it. He would not argue the question under the will. That had been settled eight years before in the same cause, and as it was only placed upon the docket of the Circuit Court to enable the plaintiff to take his verdict, and had been so long postponed, it could not now be said that the question was open again. How, then, could this Court reconsider a question which was not open, but already determined by another Court of the last resort, of competent jurisdiction? The Act of 1824, could have no operation on this will, made thirty years ago. It was so decided in the case of *Boatwright vs. Faust*. The act expressly says that its provisions shall only apply to wills "hereafter," viz: "That no words of limitation shall *hereafter* be necessary to convey an estate in fee simple by devise; but every gift of land by devise, shall be considered as a gift in fee simple, unless such a construction be inconsistent with the will of the testator, expressed or implied." It would be a disgrace to the Court and to the Country, to have two decisions so contradictory in the same cause.— What would his client think of the justice and stability of the laws? His right had been settled eight years ago, and now he was to be told that the legislature had changed it. If the Court should now change their opinion, what would the party think of the Court in the case of *Boatwright vs. Faust*? That case should also be reconsidered. He would not argue the question made under the will. It was not open.

CURIA per JOHNSON, J. It is conceded on the part of the plaintiffs, that the lands in dispute at one time belonged to William Howell, and that he devised them to his nephew, Robert Howell, and the foundation of their claim is, that the devise contained no words of perpetuity

or inheritance, and that consequently he took only a life estate in them. And it is further conceded, that if a devise in general terms and without words of perpetuity or inheritance will pass a fee simple, that the plaintiffs must fail in their action. That question was decided against the plaintiffs in the case of Crawford and Dunlap, brought up here at the February term, 1827; and in the subsequent case of Peyton, et. al. vs. Smith, et. al. determined at the sittings in Charleston, in February last, I expressed my reasons for concurring in the case of Crawford and Dunlap. They were founded on the conclusion that the conflicting opinions between the Law and Equity Courts in relation to it left the question open, or rather rendered the operation of the rule uncertain, and that the Act of 1824 was declaratory of what the law was, and therefore operated retrospectively: and I have not yet been satisfied that there was any thing erroneous in that opinion, and must adhere to it. It only remains that I should justify the Court in overturning the decision made between these parties in this identical case, and which is reported in 2nd Nott & M'Cord, 381, to which I also refer for a more particular statement of the facts.

That the Court possesses in itself the power of reviewing its own decisions, even between the same parties, and about the same subject matter of dispute, will not, I presume, be questioned. And of this, the history of the cases of Rose and Daniel, and Faysoux and Prather, are memorable examples. But when, as it happened here, the rule operated differently upon the community in the two distinct tribunals professing final jurisdiction in the last resort, it was worthy of a wise legislature to declare what the law was, and to give certainty to the rule; and the Court would have been inexcusable if it had arrayed itself against it; and I esteem it the more fortunate that this case, the only one in which the doctrine was estab-

lished, has again found its way here, and that no rights have been fixed by it ; and that the determination I am now prepared to give, settles the rights of the parties in conformity to the declared opinion of the collected wisdom of the State.

Nonsuit granted.

Norr, J. dissenting.

LAW CASES
ARGUED AND DETERMINED IN
THE COURT OF APPEALS,
OF
SOUTH CAROLINA,

IN
APRIL TERM, CHARLESTON, 1828.

JUDGES PRESENT.

HON. ABRAHAM NOTT. *Presiding Judge.*
HON. C. J. COLCOCK,
HON. DAVID JOHNSON.

TILSON RIPLEY vs. WM. WIGHTMAN.

Under a plea of no rent in arrear, the defendant may shew that the house was rendered uninhabitable by a storm.

It seems, if one rents a house for a year, and during the term it is rendered untenable by a storm, the rent ought to be apportioned according to the time it was occupied.

This was an action of Replevin. The defendant avowed for rent in arrear.—The plaintiff pleaded in bar, no demise, and no rent in arrear, on which plea issue was joined. The letting was proved. The plaintiff offered in defence to the avowry to prove, that after he had paid

up the rent in full to September, 1820, a violent hurricane occurred, by which the house in question was so injured in being nearly unroofed, as to become almost untenable and so continued up to the time of the distress; and that regular notice to repair was given to avowant, in order to discharge in full, or reduce the amount of rent claimed in the avowry, or to show to the Jury that the rent so claimed was so satisfied.

The avowant objected to the testimony on the ground, that under the plea of no rent in arrear, evidence on this point was inadmissible. That this defence ought to have been pleaded specially. His Honour, RICHARDSON, J. presiding, overruled this testimony on the ground, that it should have been specially pleaded. The plaintiff then moved for leave to file such special plea instanter, alleging that the avowant had had notice of this defence. His Honour overruled this motion, and the trial proceeded, and the Jury found a verdict for the avowant.

A motion was now made by Eckhard, for the plaintiff before this Court, for a new trial, on the following grounds:

1st. That under the plea of no rent in arrear, all circumstances were admissible which would go to satisfy the Jury that there was no rent in arrear, from the tenant to the landlord, at the time of the distress, and that the condition of the premises became such by the gale of September, 1820, as to deprive the avowant of rent altogether, or at all events to show that the sum alleged in the avowry to be due in arrear, was in fact not due but satisfied.—The Jury may apportion the rent due, and the plea of nil debet puts that matter in issue. Gilbert on Distress, 189. Eviction, expulsion, or suspension, is good evidence on nil debet. Gilbert on evidence, 335. The obligation of the tenant to pay, is founded on the enjoyment, and if that be taken away, without his own fault, as by the act of God, the rent shall be abated or apportioned; as where

a part of the land leased is covered by the sea. 6 Bac. Rent, 50. No rent in arrear is the same as nil debet. 6 Bac. Rent, 51; Gilbert Evid. 338; 3 Starkie Evid. 1296. The defendant had notice of the evidence, and its rejection operated as a surprise against which the Court will relieve. 3 M'Cord, 260.

Dunkin, contra. If a tenant expend the rent in making repairs, which the landlord was bound to make, or in payment of rent charges, he must plead that matter specially, and cannot give it in evidence under the general issue. 2 Esp. Dig. 71.

Furman, in reply. The plea of no rent in arrear, puts in issue the question, whether there is any, and what rent is in arrear, as effectually as the plea of nil debet.—1 Saund. 204, note (2); 2 Cowp. 588; 6 Bac. 51; 3 Bos. & Pul. 348; 2 Phil. Evid. 135.

CURIA per COLCOCK, J. In this case the motion must be granted. It cannot be doubted that the defence was a good one. If a man lease a house for a year, and during the term it is rendered untenable by a storm, the rent ought to be apportioned according to the time it was occupied. This is a principle of natural justice which is recognized by all the books which treat on the subject of rent. In 6 Bacon, page 60, it is said, "it seems to be extremely reasonable that if the use of the thing be entirely lost or taken away from the tenant, the rent ought to be abated or apportioned; because the title to the rent is founded on the presumption that the tenant enjoys the thing during the contract, and therefore, if part of the land be surrounded or covered with the sea, this being the act of God, the tenant shall not suffer by it, because the tenant without his default wants the enjoyment of part of the thing which was the consideration of his paying the rent; nor, has the lessor reason to complain, because if the land had been in his own hands, he must have lost the

benefit of so much as the sea had covered." But it is said, on the other hand, that if one leases a house for a term, and there be no special contract as to repairs, that the loss must fall on the tenant, for he is quasi the owner for that period, and he cannot, or ought not to complain of the act of God; and the cases of *Belfour vs. Weston*, 1 Term Rep. 312; *Monk vs. Cooper*, 2 Lord Raymond, 1477; and the same case reported in 2 Strange, 762, more particularly, did seem to give some support to this view of the subject. But upon an examination it will be found that they do not sustain the position, but only go to show that where there are mutual independent covenants that each must rely on his own, and that the lessee will not be permitted to set off the landlord's covenant to repair against an action for the rent. In the two first Reports, it is said broadly that the tenant must pay the rent, even where a house is burnt; but in the case as reported in Strange, it is clear that it is placed on the ground of the independent covenants; for the Court say, if the defendant has any injury he will have his remedy, but he cannot set it off against the demand for rent. The plaintiff must have judgment. And this brings me to the only question now to be considered, which is, whether this defence can be made in this case under the plea of, no rent in arrear. I am satisfied that it can be; for we have relaxed very much the rigidity of the rules of pleading, and have allowed as a defence to a bond matter which did affect the consideration of a bond, as in the case of *Thurston and Ballinger*, and the plea is in fact a plea of *nil debet*, under which it is clear that the defence would be good.

In the case of *Warner, et. al. vs. Theobald, Cooper and ———*, which was an action of debt for rent, the defendant pleaded *riens in arrear*, and the plaintiff demurred. Mr. Buller, for the demurrer, contended that the plea was bad, because it was calculated to surprise the plain-

tiff, for he could not tell whether the defendant would deny the lease, or set up a payment *before* or *since* the action brought; for it only says, "nothing is in arrear," which must relate to the time of the plea pleaded, but it might be in arrear, before and at the time of the action brought. Mr. Wood, contra, among other things, contended that "*riens in arrear*," is a fairer plea than *nil debet*, because *nil debet* puts the whole declaration in issue, whereas this confines the question to the fact, whether such rent was due; yet *nil debet* would have been a good plea. Hard. 332; Lord Ray. 1503; Buller's N. P. 170. Indeed, between *nil debet*, and *riens in arrear*, there is no substantial difference. In *replevin*, the latter is the constant plea. Lord Mansfield, said Mr. Wood, had fully satisfied him. "Nothing can be clearer than the present case. The declaration says there is so much rent in arrear.—The plea says there is not. The saying there is nothing in arrear, is the same as if he had said *nil debet*, and it is absurd to suppose that it relates to the time of the plea, and not to the action. Besides, it is a more favourable plea for the plaintiff—it is an answer to the action. The action is in the present tense—so is the plea. It is the *general issue*. If the rent was due, and is not at the time of the plea, it could not have ceased to be due except by the plaintiff's receiving it, and if so, he waves the action though it was well brought at the time." This case is conclusive, for if we consider the plea, then the evidence offered should have been admitted, and the defence heard. And I do not think there is that danger of surprise which seems to be apprehended, for such a fact as the injury complained of was not likely to escape the knowledge of the plaintiff, and in this case defendant offered to prove that he called on him to repair. It is certainly more convenient to suffer a matter which would operate as the foundation of a separate action

to be given in evidence by way of defence, and should always be done, when it does not operate as a surprise.

Motion granted.

Norr, J. Whether the rent ought to have been apportioned or not, is a question on which I give no opinion, because the question is not submitted to us. But I am of opinion the evidence offered was admissible under the plea.

**The Escheator of ST. PHILIP'S and ST. MICHAEL'S vs. the
Real Estate of HESTER SMITH.**

When by deed a use is limited to a person, an alien, for life, with a power of appointment, and in case of failure of appointment to her right heirs—held, that she having made an appointment and died, before office found, the estate in the hands of the appointees, citizens, was not subject to escheat, office not having been found during her life time.

Whether a use is vested or not, under the statute of uses, depends entirely on the intention of the grantor. If the trustee is simply to hold, for the use of the cestuique use, then the statute transfers the use into possession; but where it is necessary to the execution of the trust, that the legal estate should remain in the trustee, then the use is not executed—as where lands are devised to trustees for the use of a married woman, in trust to pay the rents and profits to her, or to permit her to take the rents and profits, &c.

So where lands were conveyed to a trustee, in trust for the sole and separate use of a *feme covert*—held, that the use was not executed under the statute.

John H. Folker, by deed, conveyed to Joseph Alexander, a lot of Land in the City of Charleston, in trust for the sole and separate use of Hester Keenan, a married woman and an alien, during her natural life, and in the further trust for such uses, as she should by a will in writing limit and appoint, and in default of such appointment to her right heirs. Hester Keenan, afterwards Hester Smith, made her will, by which she devised the premises to the Traversers, and died; and the question now was, whether the premises escheated to the State.

The case was tried before RICHARDSON, J. who gave judgment for the traversers on the grounds—First, that the estate conveyed by the deed was a trust, and not a use executed under a Statute of Uses, and that it therefore did not escheat upon the death of the cestuique trust, who left heirs; but remained in the trustee as the legal tenant of the freehold. Secondly; that admitting that the possession was executed by the statute, then H. Smith, the cestuique use was capable of taking the freehold, and of devising it before office found, and having so devised it to the traversers, who could both take and hold real estate, it became vested in them, and was no longer subject to escheat, the traversers being citizens, deriving title by purchase from an alien before office found.

This was a motion to arrest the judgment given by the Circuit Judge.

Arson, for the appellant, made the following points:—

1st. That the use created by the deed, in favor of Hester Smith, was a use executed by the statute, 27 Hen. 8; and therefore her estate was a vested legal estate, and not a mere trust of equity, and so the matter was cognizable in a Court of law, independently of the Statute of Escheats, as if no trustee had been named.

2nd. That the real estate, which was the subject of the office was not vested in the devisees of H. Smith, by virtue of her appointment, discharged of all trusts, and it was immaterial what was the state of the property during her life, or whether she had in it a legal or equitable interest; since this proceeding was against the property in the hands of the devisees.

3rd. That even if the property be considered as vested in trustees to the uses of the deed, the Court of Common Pleas has jurisdiction of the whole case by virtue of an express statute, and all powers incident thereto; so, that

it was not necessary for the escheator to go into a Court of Equity to have the trust executed for the estate.

4th. That, considering the estate as a legal estate, an alien at common law could not devise lands, so as to convey an indefeasible title to his devisees, as against the State, nor was there any thing in the possession of a person capable of holding, to whom land has been conveyed by an alien which prevented his being ousted of such land by an inquest of office.

5th. That the power of appointment given to Mr. Smith in the deed, which was a power coupled with an interest, could not at law, or in equity, be exercised by an alien so as to bar office, and so the appointment made under it (if it was not wholly null and void) was as defeasible as any conveyance at common law, whether it were considered as in a Court of Law, or Equity.

Leek & Kennedy, against the motion cited, 9 Wheaton, 354; 1 Brev. 6, 300, 307; Saund. 98; Fairfax's case, 7; Cranch, 621; 4 Wheat. 453; 11 Wheat. 337; 12 Ves. 238, 213; 17 Ves. 73; Horner vs. Horner, 7 T. R. 648; Sugden on Pow. 331; Hardres 494; 1 Ed. Rep. 277, 910; 1 Black. 128; 4 Harris & M'Hen. 484, 412; 1 Mass. 256; 12 Mass. 143; 1 Johns. C. 395; 3 John. C. 109; Pub. Laws 92; Act of 1807, p. 59.

Furman, in reply, cited 7 Co. 25; 4 Co. 95; 1 Wheat. 198; Sug. on Pow. 377. A general power was equal to a fee simple. Sug. Pow. 99, 102, 177-

CURIA per JOHNSON, J. No objection was raised to the right of Joseph Alexander to take and hold as trustee, and it has not been controverted that before the statute 27 H. 8, c. 10. the premises would not have escheated; but it is contended, that under that statute the use was executed in Hester Smith, and being an alien, and therefore incapable of taking and holding to her own uses the premises escheated to the State; and whether

it did or not, is the first question which falls within our observation.

By the common law, if one was seized of a legal estate in lands, to the use of, or in trust for another, they were not liable to the debts of the cestuique trust, and by means of secret trusts of this sort, a door was opened for innumerable frauds ; and the object of the statute was to remedy this evil. And for this purpose the statute transfers all such uses into possession, or in other words, it invests the cestuique trust with a legal estate in the trust property, by declaring him seized to all intents and purposes in such like estates as he had, or shall have in use, &c.

It is apparent that this statute never was designed to create an estate not conveyed, or to transfer one into possession which never existed ; and I think it will not be difficult to demonstrate that Hester Smith took under this deed only a use for life, with the power of appointment, and that however that interest, whether in use or possession, might have been effected by the law of escheats it has passed away, and the estate has become legally vested, according to the limitations of the deed of trust.

By the terms of this deed the use is expressly limited to the life of Hester Smith, and admitting that was transferred into possession by the statute, no more than her life estate could have escheated, because it was all the interest she had in it. Let it be admitted also, that under the limitation over to her right heirs, in default of her appointment by will, the fee would have vested, if she had been capable of taking, and I think the same consequences would result. She did execute the power of appointment ; that contingency did not, therefore, happen, and her interest resulted in a life estate. As an alien, too, she could have no heirs, and consequently the condition of a limitation over to them was impossible and void.

Assuming, as before remarked, that the statute did not intend to vary or enlarge the quantity of the interest granted, but only to change its character from an equitable to a legal estate, whether it is or is not transferred into possession, must depend entirely on the intention of the grantors expressed in the grant. If the office of the trustee is simply to hold for the use of the cestuique trust, then the statute transfers the use into possession; but where it is necessary to the execution of the trust, that the legal estate should remain in the trustee, then the use is not executed by the statute, because it would defeat the object of the trust; as in the case of *Nevil vs. Saunders*, 1 Vern. 415, where lands were devised to trustees for the use of a married woman, and in trust to pay the rents and profits to her from time to time, or to such other person as she should appoint without the controul of her husband.

So in the case of *Harten vs. Harten*, 7 Dal. 648—where it was held that a devise of lands to trustees upon trust to permit a feme covert to take the rents and profits during her life for her sole and separate use, and after her death, to the use of her first and other sons, &c.—Lord Kenyon in delivering the opinion of the Court, remarks, that whether this be a use executed in the trustees, or not, must depend on the intention of the devisor to be collected from the will.—This provision, he adds, was made to secure the feme covert a separate allowance, free from the controul of her husband, to effectuate which it is essentially necessary that the trustees should take the estate with the use executed in them, otherwise it would defeat the very object that the testator had in view.

Cases illustrative of the principle might be cited in almost endless variety, and although I have not been able to find one exactly parallel to the present in every particular, the analogies are very strong, and bring the case,

I think, clearly within it. In some respects, it is the counter-part of the case of *Horton vs. Horton*. The trust here, as in that case, is for the sole and separate use of a married woman without the controul of her husband, and by transferring the use into possession, the husband would be entitled to the rents and profits, and thus the object of the trust would be defeated, and, like the case of *Nevil vs. Saunders*, the legal estate must remain in the trustee in order to give effect to the limitation over to the appointee of *Hester Smith*.

It is said in *Com. Dig. Tit. Alien. 63*, that if an alien purchase lands and take titles in the name of a trustee, that the King cannot have an inquisition; but that he must go into Chancery for the purpose of having the trust executed, and *1 Roll, 194; Hard. 495*, are cited as authority, and herein the grounds that were taken in reference to the jurisdiction of the Court. Apart from the question of jurisdiction, and in reference to the principle alone, this authority taken to the fullest extent, will not support the grounds of the motion. Let us suppose this proceeding was a bill in Chancery, and the object was to have the trust executed in the cestuique trust, in what manner would it be executed? It could not be executed in *Hester Smith*, for her life estate is terminated, and it could only, therefore, be executed in her appointees; for such are the provisions of the deed, and such must be the effect, if the intention of the grantor is to be effectuated; so, that in any view of the subject the escheat is saved.

This conclusion renders the consideration of the other questions in the case unnecessary, and the motion is therefore rejected.

Judgment affirmed.

The TREASURERS vs. JOHNSON and others, sureties of
STEEDMAN, Sheriff.

Where the principal to a bond has been sued, and his body taken with a ca. sa. and discharged with his consent under the provisions of the Act of 1815, it does not release the sureties.

The plaintiffs in this case had obtained judgment against the principal, and had taken his body under a ca. sa. but with his consent had discharged him from the arrest, under the provisions of the act of 1815, which authorizes the plaintiff to discharge the defendant in custody under a ca. sa. with his consent, without weakening the force of his judgment, or in anywise incapacitating the plaintiff from afterwards taking out a fi. fa. or ca. sa. against the defendant. The sureties now contended that this discharge of the principal had released them. The Court thought otherwise, and this was a motion for a new trial on that ground.

M'Cready, for the sureties, cited *Rees vs. Berrington*, 2 Ves. Jr. 542. It was giving time. *Law vs. East India Company*, 4 Ves. Jr. 824.

Willson, same side. The act of 1815, was made for creditor and debtor, and does not affect sureties. Suppose the party had taken the benefit of the insolvent debtor's act.—This act was *expost facto*, and impaired the obligation of contracts, and was therefore void.

Grimke, in reply. The sureties have not lost the benefit of the lien by the discharge, but by the taking of the body under the ca. sa. Fell on mercantile guaranties, 58, 215. It was no part of the contract that the plaintiff should take the body. 13 Johns. 174.

CURIA *per* COLCOCK, J. The general doctrine involved in this case is too well and generally understood to require much observation. If the creditor enter into a new contract with the principal, or do any act by which the surety is injured, or his remedy against the principal

postponed or destroyed, such act or contract shall release the surety, and when we test the case before us by these rules, I think it will be no difficult task to show that the sureties, in the case at bar, ought not to be discharged. It is readily admitted, that persons placing themselves in such a situation as to become ultimately bound for others, ought to be protected from the consequences of the acts of persons which they could not know of or controul; but it must never be lost sight of, that the law in accordance with that harmony which pervades its whole system, gives to the surety certain rights and privileges, by which, if he be vigilant, he may do much to protect himself, and therefore we should not be disposed to carry the protection afforded to sureties beyond the prescribed boundaries marked out by the adjudicated cases, none of which can be made to embrace the case before us. In treating of this doctrine, Mr. Maddock has cautiously and clearly marked out those acts by which a surety may be released from his liability, and has assigned many of the reasons on which the doctrine is founded. But he no where intimates, even in the most distant manner, that the taking of the body of the principal in execution, operated a discharge to the surety. In his first volume, page 234-5, he says, "But where any act has been done by the obligee that may injure the surety, the Court readily lays hold of it in his favour, and will in such case, if called upon, decree a perpetual injunction to restrain the holder of the security from suing upon it; as, if the holder, without the consent of the surety, by *positive* contract between the creditor and the principal, (not where the creditor is merely inactive,) gives time, accepts a *composition*, or discharges the *estate* of the principal, the surety will stand exonerated; for if, in such case, a demand could be made on the surety, he might enforce a payment from the principal contrary to the agreement. The surety is

held to be discharged for this reason also, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because, in fact, he cannot have the same remedy against the principal, as he would have had under the original contract. A surety is entitled to every remedy which the creditor has against the principal debtor," and cases are referred to in support of each position. "But it is said the mere taking the body in execution is a discharge of the surety. Now let us examine this position, first on principle, and next in reference to authority.—What is the object of taking a surety?—To secure the payment of the debt, or to enforce a performance of a contract, as the case may be. Now it has not been, and cannot be denied, that the surety can compel the creditor to sue his principal when he thinks himself in danger, or is unwilling to remain longer bound. If authority for this is necessary, the case of *Pain and Packard*, 13 Johnson, 174, is directly to the point, in which it was ruled that the surety was discharged because the creditor did not sue the principal, who afterwards became insolvent, and that a plea to that effect was held good in demurrer. The surety then requires the creditor to sue—he does so, and takes the body, and the debtor cannot pay; it is then contended that the surety is released, thus enabling one to destroy his own contract, and to discharge himself from a liability which he had incurred with reference to the very state of facts by means of which he is now to discharge himself.

To my mind, this involves an absurdity too obvious to require further exposure. But as it was very warmly contended on the part of the defendants, and some views were exhibited which it was thought would bear on the question, it may not be improper to refer to some autho-

rities. It was said, if the principal had been held in custody he must have paid the debt, or been released by the operation of law ; and in either case the sureties would have been discharged. As to the first there can be no doubt ; but it is expressly denied, that if he had been discharged under the insolvent law, that they would have been discharged unless the creditor had voluntarily done some act which would have discharged the principal : such as receiving a part of the debt in discharge of the whole, as in a bankruptcy ; for hard as that case is on the creditors, I admit it has been so ruled. Chitty on Bills, 4 Term Rep. 825 ; 3 Maul & Selwyn, p. — ; and in the case of Rees vs. Benington, Lord Eldon, speaking of the case of Nesbitt and Smith, says: "There the creditor being called upon, did put the bond in suit. If he had proceeded, the consequences would have been only that he would have had the person in custody, it would have been no payment." The body is no payment when taken in execution, though as between debtor and creditor, and in relation to the rights of other creditors, it is sometimes considered as a legal satisfaction, as in the cases of ————, decided at this Court ; and so in the case of bail, which has been relied on as an authority applicable to this case, but which is distinguished by this most prominent fact, that the delivery of the body, by the contract itself, is a discharge ; and, therefore, if the creditor do not take it, or prevent the bail from doing so, they are necessarily discharged. In Fell, on mercantile guarantee, p. 197. to 213, this doctrine is fully discussed, and all, or many of the cases collected, and it is clearly shown that there is no foundation for the claim of the defendants, either on the ground of the arrest, or that of extension of time ; for it is there said, in the case of Ex parte Smith, A. and B. borrowed money from C. on their bond—B. becomes bankrupt—C. sued A. to judgment, and took

him in execution on a *ca. ad sat.*, but discharged him on payment of part. He afterwards preferred his petition to the Chancellor to be admitted to prove his bond, against the estate of B. He was allowed to prove for one moiety only; but it was said by Lord Harcourt, Chancellor, that if B. had borrowed all the money in which case A. had only been a security, C. would have proved for the whole; and this case shows the good sense of the rule. No injury was done to the party bound, as in the case before us. By the act of 1815, it is declared that a creditor who has taken the body of his debtor, may release him with his consent, without impairing the effect of his judgment, and that it shall not prevent him from taking out a *ca. sa.* or *fi. fa.* at any time afterwards. Now, what injury has been done? The principal is still liable to be taken. No change in his circumstances has been proven. For aught that appears, he is as able to pay the debt now, as when discharged. He may be taken again to-morrow, if the securities require it, and then they would be placed in statu quo, as before the discharge; and this is a complete answer to the case of the East India Company, which has been pressed into the service in the argument. The money which had been left by the principal to discharge his sureties, had been paid back to him, and he declared no longer a debtor. The money could not be regained, as here the body may be. The securities were consequently liable, and still more so where their principal had been suffered to leave the country. As to the idea that time was given, that of itself never did operate as a discharge, (see *Fulton vs. Mathews*, 15 Johnson, 433; *Paine vs. Packard*, 13 Johnson 174,) and in one of the cases, *Shubrick and Russell*, the obligee took additional and collateral security, and even prolonged the time of payment for the additional security. Upon the whole, we can see no ground on which to discharge the sureties.

No new contract has been made, and no injury done to the sureties. *Motion granted.*

GEORGE KECKELY ads. COMMISSIONERS OF ROADS for St. John's Parish.

It seems that where a parish line runs through a plantation, leaving the dwelling house and some of the negro houses in one parish, and the rest of the negro houses in the other parish, that all the slaves are bound to do road duty in the parish wherein the dwelling house is situated.

Where notice is required by an act to be given, a newspaper notice is not sufficient, unless made so by the act.

The Commissioners of Roads must give personal notice to persons called upon to do road duty or to make return of their slaves liable to do duty; and the notice must prescribe the time and place.

Though the act of 1825 requires the Boards of Commissioners of each district at their first meeting after the passing of the act, to divide their respective parishes into as many road divisions as there were Commissioners, and to assign one division to each Commissioner, who is authorized to call on the inhabitants of his division, to make returns of their slaves liable to do road duty, yet they are bound to obey the notice of all the board, should no such divisions be made, or before they be made.

The suggestion stated in this case that the relator had under his charge a plantation in Charleston district, the dwelling house of which was situated in St. James' Parish, Goose Creek. That seven hundred acres, part of the tract, were in St. James' Goose Creek, and two hundred and fifty acres in St. John's, Berkley. That he, the relator, had lately received notice from the board of commissioners from St. John's that they had fined him fifty six dollars, and were about issuing out an execution for the same, for not making a return of the number of negroes under his management liable to work on the high roads. That the relator has remonstrated with the said Commissioners against the injustice of the fine and proceedings of the Board, and received for answer that they had no discretion or power to re-consider the matter by

law, and that the fine must be paid, otherwise the execution would be pressed against him. That under these circumstances he had no other mode of redress left him but by an application to the Court of Common Pleas for a writ of prohibition to restrain the Commissioners aforesaid from further proceedings in the premises. And the said relator gave the Court further to understand that by the act of the Legislature in 1825, sec. 11th, the several Boards of Commissioners throughout the State were directed at their first meeting after the passing of that act, to divide their respective parishes into as many road divisions as there might be Commissioners, and assign to each Commissioner one division over which he should have the superintendence. That each Commissioner in his respective Division is thereby authorized to call on all the inhabitants within the same, to make return on oath, (if required) of all the male slaves belonging to them and under their care and management between 16 and 50 years of age at such place, and within such time *as he shall appoint*. And in default thereof, that such inhabitant shall forfeit and pay 4 dollars for every such slave neglected to be returned. And the relator further suggested that no notice had ever been given him by any person whatever, of the *time* or *place* where he was to make a return as required by the act, which directs that the Commissioner of each division should call on the inhabitants of the same to make the return at such time or at such place as the Commissioner in each division shall appoint. Nor has he the relator received otherwise any notification of the time or place when and where the said return was to be made, nor of the person to whom it was to be made. And the relator further suggests that he cannot be made liable to such penalty, as he firmly believes that from the local position of the plantation he cannot be considered as an inhabitant of the Parish of St.

John's, Berkley, so as to be amenable to the Commissioners of the Roads for the said Parish. Wherefore he prays for a writ of Prohibition to restrain them in the premises, &c.

On the argument the following grounds were taken and relied on by *Eckhard* for the relator.

1st. That as his Plantation lay partly in both parishes, and some of his negro houses were on one side of the parish line in St. John's, and some on the other side of the line in St. James' Parish, to wit, six of them in St. John's and four of them in St. James', his place of residence ought to privilege the whole and attach them to and be considered as one settlement and to be construed to be within the Parish where his dwelling is situated, viz. in St. James. Otherwise he must be distracted by dividing his force of hands to work in both parishes at the same time, which was inconsistent with justice.

2nd. That the act requires that the Commissioner in whose division the inhabitants reside, *shall call* upon them to make the return upon oath of their slaves liable to work on the high roads between 16 and 50 years of age at such *time* or *place* as he the Commissioner shall or may *appoint*, and in default of making such return, the inhabitant shall be fined for default, &c. That the Commissioners of St. John's entirely omitted or refused to call on him the relator for the return of his negroes, and therefore it was contended he was not liable to be fined.

Mazyck & Frost, for the Commissioners, in reply.

1st. They urged that the law made no provision for the construction contended for in the relator's first ground of attaching the negro houses in St. John's Parish to the relator's domicile, situated in St. James', and that the geographical lines of the Parishes only were to govern them in calling out the negroes within their bounds, regardless of the situation of the Planter's dwelling house; consequently that the negroes inhabiting the six houses situa-

ted in St. John's Parish, were liable; and the relator had incurred the penalty of the act for not returning those that were liable in that parish. Those situated in St. James' Parish they disclaimed any jurisdiction over them.

2nd. In answer to the second ground taken by the relator they argued that although the term *call* is made use of in the act, yet it is of very general and extensive import. The act has not defined whether this *call* must be in person or in writing, or by public notice—that it never was intended by the act that the Commissioners of the high roads throughout the State, should ride like post boys through the State, and call at every man's house with a Bible or Testament in his pocket to swear him to the return of his negroes liable to work on the high roads. It would be such an intolerable hardship that freemen would not be found to submit to it. Nor could it have been the intention of the act that the high road Commissioners of the State, should write notices to every inhabitant and send them by expresses round the country to every inhabitant to call upon him, or meet them at some appointed place in order to make their returns. The fair inference then, was, that this *call* upon the inhabitants to make their returns must have been intended to be understood to be in the old accustomed way in use from time immemorial, by public notice in one or more of the Gazettes in the district or parish where the parties reside. If this latter mode should be considered as the one contemplated by the act, then the Commissioners of St. John's had done all that the law required of them; for the public Gazette was produced with notice under the hands of all the Commissioners of St. John's Parish, calling on the inhabitants to come forward to one of them, to make their returns agreeable to law, and as the relator omitted or refused to come forward to make such return, he had himself to blame, and must take the consequences.

BAY, J. who heard the application, delivered the following opinion : After perusing the clause of the road act relied upon, and considering this case, I am of opinion that the act is not so explicit and definite as was to have been expected, when the Legislature were about amending the high road system, and throwing all the acts upon that subject into one; for the mode and manner of *calling* upon the inhabitants to make their returns of their negroes liable to work on the roads is certainly susceptible of the different constructions given by the counsel for the Commissioners, and it is difficult to determine with certainty which was the mode intended by the act. In such a case, and where there is such ambiguity, the best way of getting over such a difficulty, is by resorting to ancient ways or immemorial customs; for I never can bring myself to believe that the Legislature could have intended to impose so great a hardship on the Commissioners as to require them to ride through the Districts or Parishes, to every man's house to swear him to his return, and if not at home to call again and again until he could be found.—To give the words of the act this construction would prevent any man of respectability in the country from serving as a Commissioner. The next mode urged, was that of writing notices to every man and sending them by expresses through the country. This mode would be nearly as troublesome as the former, and as exceptionable in every respect. The only mode of reconciling the manner of calling upon the inhabitants to make their returns, with the intention of the Legislature, is by resorting to the old mode of advertising in the public Gazettes where they are printed, or by affixing up public notices of the time and place of making these returns, at the most public and notorious places in the country, where no Gazettes are printed; and this has been the practice in the State from time immemorial, and no inconvenience

has hitherto been experienced from it, and I trust none will be, by a continuance of it. From this view of the case, I am disposed to consider the advertisement produced in the public Gazette under the hands of the Commissioners of St. John's Parish, as good and sufficient notice under the act—as however it appears that only six of the relator's negro houses are in St. John's Parish, and four of them over the Parish line in St. James, the Commissioners have no authority to exact any fine but for those within the lines of their parish. As to the relator's domicil or dwelling house affording protection or exemption to those of his negroes over the lines of St. John's Parish, the law recognises no such protection or exemption. I am therefore of opinion that the prohibition should be refused as to all the negroes of the relator residing in St. John's parish, but to be extended to protect those from fine residing over the line in St. James' Parish.

The relator appealed from this decision on the following grounds, viz :

1st. That the Commissioners for St. John's did not divide the Parish into as many roads and divisions as there were Commissioners in conformity with the act of 1825.

2nd. That the notice by newspaper was not a compliance with the terms of the act, and was of itself insufficient.

3d. That no notice was given by the particular Commissioner to whom the division of St. John's Parish within which the relator was held liable to road duty, of the time place or persons to whom the return of slaves was to be made.

4th. That the relator was not an inhabitant of St John's Berkley, but of St. James Goose Creek, and not liable to road duty.

5th. That negroes are liable to road duty in the parish in which they usually work, and not in such parish as they sleep.

CURIA per JOHNSON, J. The fine imposed on the relator to restrain the collection of which was the object of this application, was for not making a return on oath of the slaves belonging to him and liable to work on the roads conformably to the acts of 1825, and whether the Commissioners had or had not partitioned out the roads of the parish amongst the several Commissioners, appears to me wholly immaterial to the questions arising out of it. I can well conceive that a knowledge of the number and residence of the hands liable to work on the road would be necessary to enable them to make an equitable and judicious partition, and for the same reason I incline to think that the advertisement signed by all the Commissioners (if the manner was legal) calling on the inhabitants to make returns of the number of their slaves liable to do road duty, would be a sufficient compliance with the act; for the act expressly authorises the Commissioner of a particular section or district to require the returns to be made to such person at such place, and within such time as he shall appoint. He had then the authority to direct that it should be made to one of the Commissioners of the Parish and the notice is not the less his act because the other Commissioners were joined with him, if indeed they had made partition of the roads, and the power over the section on which it is claimed the relator's slaves were liable to work, had been assigned to an individual. The case then is resolved into the following propositions.

1st. Whether the slaves of the relator whose houses are situated in St. John's Parish were liable to do road duty in that Parish?

2nd. Whether the notice published in the newspaper, calling on the inhabitants to make return of their slaves was sufficient to charge the relator?

The Court being with the relator, has declined expressing any opinion on the first; but I cannot forbear to ex-

press my own conviction that the relator is entitled to his prohibition on the first ground also. The Parishes of St. John's and St. James. Goose Creek, are separated by an ideal line, and from the facts stated, it appears that on running it out it is found that his dwelling house and a part of his negro houses are on the side of St. James' and some of his negro houses are on the side of St. John's, and it is said that his plantation on which his negroes are usually employed is on St. James', and whether this is or is not the case, it will serve as an illustration. Now I agree that for very many purposes, unnecessary here to be mentioned, a mere ideal line will mark the residence of an inhabitant; but our slaves like other chattels are in legal contemplation attendant on the person of the owner, consequently his residence must be theirs. I do not intend to be understood as laying down this as a rule of universal application. Public policy and convenience would restrain it when it would operate injuriously to the public or the individual; but as applicable to the case under consideration, I am unable to perceive any evil or inconvenience.

The plantation of the relator is entire. His dwelling house, negro houses and plantation, constitute but one establishment, of which the dwelling house is the centre and himself the head, and his slaves are employed on the one side or the other of the line as his necessities may require; but the possession of, and property in the whole is concentrated in him, and partake of his individual personal identity, and his residence must be regarded as the residence of the slaves so immediately attached to him.

The individual is not favoured by this conclusion, nor can I perceive that the public service will be prejudiced by it. He is bound to contribute to the public burthen in that parish in which he resides, and it is certainly a convenience not only to him but to the superintending Commissioner that his hands should be kept together.

2nd. On the second ground there is, I think, less doubt. The act of 1825 authorises the Commissioner to *call on* the inhabitants to make their returns and to designate the time when, and place where and the person to whom it is to be made, and imposes a heavy penalty for the neglect—and the mode adopted was to publish a notice in the newspaper; but the act does not authorise this mode, and the rule clearly is that a newspaper notice is not sufficient, unless that mode is pointed out by the law. 1 Phil. Ev. 335. It is said, however, that this mode is sanctioned by long usage, but I am unable to discover the evidence of the fact, nor can I reconcile such a practice to sound reasoning or good policy, especially in those districts or parishes where there is no paper published. The effect would be to impose a penalty against which it would not always be possible to guard. If notice in one paper should be held sufficient, of course it must be so in another, and the inhabitants would be bound to watch in all the papers of the State, to learn what was their duty in a mere neighbourhood concernment. This is unreasonable and cannot be allowed. The mode prescribed for summoning the inhabitants to work on the roads by a personal notice is convenient, safe and practical—and I can see no good reason why it should not be adopted in relation to the returns. It is, therefore, ordered and decreed that a prohibition do issue according to the prayer contained in the suggestion of the relator.

Petition granted.

THE STATE VS. W. PURSE.

In an indictment for erecting or keeping a house, which is a nuisance to the neighborhood, two things only are necessary to be stated:—1st. That from the nature of the establishment it may be an annoyance; and, 2dly. That from its situation it has actually become so.

A house, which from the purposes for which it is used, or the situation in which it is placed, may not be a nuisance, may become so by negligence in keeping it: when that is the ground for prosecution, it must be so laid in the indictment.

This indictment was tried in the City Court of Charleston, and was in the following words:—"The Jurors present, that William Purse, a resident of the City of Charleston, on the first day of January, in the year of our Lord, one thousand eight hundred and twenty-six, at St. Michael's Alley, in the City of Charleston and within the jurisdiction of this Court, unlawfully and injuriously, a certain building called a necessary house, before that time erected near and adjacent to the public street or lane, called St. Michael's Alley, did continue, and from the first day of January till the day of taking this inquisition, still doth continue the said building, near and adjacent to the public street or lane, called St. Michael's Alley, whereby the houses of persons living in the said street were filled with noxious and unwholesome smells from the said building, and the air was greatly corrupted by the stench of the said building, to the great damage and common nuisance of the inhabitants residing in the said street, and also of all persons along the said street, going, passing, and returning, and against the peace and dignity of the same State aforesaid."

A motion was made to quash this indictment, and granted by his honour, the Recorder, for the following reasons:

THE RECORDER. It will be observed, that it makes but the single question, whether the erection of such a build-

ing near the street, be, or be not a nuisance? I thought that there could be no argument in the affirmative—that its location alone was harmless, though it might be rendered otherwise by a variety of circumstances, such as from its leading to a public exposure of the person, contra bonos mores; by being so badly built as to overflow, or so badly kept as to become offensive to the passengers, neighbours, &c.; but as this would constitute the gist of the offence, they should have been stated in the indictment, if they were relied on. This principle I thought clearly laid down in the case of the *People vs. Sands*, 1 Johns. 78; and in the following cases, decided by our own Courts; *State vs. Wilson & Strange*, 2 Const. Rep. Mills Ed. 135, when it was held, that whatever was necessary to warrant a conviction must be alleged in the indictment—as felonice, murdravit in murder: felonice cepit et asportavit in larceny. So in the *State vs. Rustling*, 2 Nott & M'Cord, 560, in every indictment for a particular offence the manner of its commission should be accurately stated. So in the *State vs. Wimberly*, January term, 1825, it was held that the special manner of the whole fact should be set forth in the indictment with such certainty that the offence may judicially appear to the Court. So in *Brobant*, ads. *State*, January term, 1825, the Court say, it is proper when there is any doubt about the manner in which the offence was committed, to lay as many counts in the indictment as will embrace all the variety of circumstances. As this indictment contained not one circumstance which, in my opinion, constituted an offence, I thought it my duty to quash it.

Petigru, attorney-general, appealed, and moved to reverse the judgment of the Recorder, on the ground that the indictment did sufficiently set out the offence.

CURIA per NOTT, J. I concur with the Recorder in opinion, that whatever is necessary to constitute the of-

fence must be set out in the indictment ; but it does not appear to me to be strictly applicable to this case. The erection of any building which, from its disagreeable odour or noxious effluvia, is offensive or unwholesome, may be a nuisance, 4 Blk. Com. 167; 1 Russell, 428-9; 9 Coke, 57; but whether it actually is, or is not so, must depend upon circumstances. A house that would be a nuisance in one place, will not be so in another. Thus, for instance, it is said that a brew house, glass house, chandler's shop, or sty for swine, set up in such part of a town as to incommode the neighborhood, are nuisances. 5 Bacon Tit. Nuisance A. But neither of these would be nuisances, if erected in the country, or such part of a town that nobody would be annoyed by them. It appears to me, therefore, that two things only are necessary to constitute the offence. First, that from the nature of the establishment, it may be an annoyance; and, secondly, that from its situation it has actually become so. Those two things, therefore, is all that are necessary to set out in the indictment. A house, which from the purposes for which it is used, or the situation in which it is placed, may not be a nuisance, may become so from the negligent and filthy state in which it is kept, and when that is the ground for prosecution it must be laid in the indictment. The allegation in the present instance is, that the defendant has erected a building (which must be necessarily more or less offensive) in such a part of the town as to incommode all the neighborhood. It is not because it is negligently kept that it has become so; but that however it may be kept, the effect would, from the situation in which it is placed, be the same. It was, therefore, a question for the Jury to determine, and not for the Court; and that appears manifest from the ground of defence relied on in this Court. It is said, that the residence of the defendant is in a thickly settled part of

the town, where it is impossible for him to erect such a building on any part of his lot, but that some of his neighbours must be offended; and that he could select no spot less inconvenient to them than the one which he has chosen. Clustering together in a crowded town, necessarily brings with it many inconveniences—a scolding woman, clamorous servants, and crying children, are sometimes a great annoyance; but these are the penalties which a person must pay for a city life. Much also depends upon habit and education. The narrow lanes and streets of a town are offensive to a person who has always been accustomed to the free and unconfined air of the country.—Even the fashionable etiquette of a town is irksome to a person who has been accustomed to indulge in the familiar and unrestrained intercourse of a country life. What, therefore, would be a nuisance to one person, would be no inconvenience to another. What would be a nuisance in one situation of life, would in another be the necessary result of a combination of circumstances not to be avoided. These are considerations which must generally constitute a part of every case of this sort. Now, whether the defendants in this case has been guilty of unnecessarily erecting a building in a situation which is offensive to a neighborhood, or whether the inconvenience which they experience is the necessary result of circumstances which are beyond his controul, is the question submitted for consideration, and that is a question which belonged to the Jury to determine, and not to the Court. I am of opinion, therefore, that the decision ought to be reversed, and the cause tried on its merits.

Judgment reversed.

PEYTON and others vs. SMITH and others.

Words of perpetuity or inheritance are not necessary in a devise to convey a fee in real estate.

A devise of "my plantation to W. S." gives a fee.

The act of 1824, which enacts "that no words of limitation shall *hereafter* be necessary to convey an estate in fee simple by devise," is not retrospective, but a declaratory act.

In general the Legislature cannot prescribe and establish a new rule and give it a retrospective operation, but where the rule is unascertained and unsettled, it belongs to the Legislature to ascertain and settle the law, and from necessity such a law must operate both prospectively and retrospectively.

This was an action of trespass to try title to a Plantation on Slanns Island, in the District of Colleton.

The right of property turned on the construction of the following clause in the will of Edward Wilkinson, deceased, viz. "*My plantation on Slanns Island, I devise to my cousin, William Smith*" If this devise gave a life estate only to Wm. Smith, the plaintiffs were entitled to recover; if it conveyed a fee simple, the defendants were entitled to the land.

The facts were found by special verdict, and HUGER J. who tried the cause, gave judgment for the plaintiff, and this was a motion to reverse his judgment.

Ford & De Saussure, for the motion.

Petigru, Attorney General, contra.

CURIA *per* JOHNSON, J. The only question involved in this case was settled by the judgment of the Court in *Dunlap vs. Crawford* 2, M'Cord's Chan. 171, and I only use it now for the purpose of expressing more fully than I then did the reasons which induced me to concur in that judgment.

Until the organization of this Court, in Dec. 1825, the Chancellors, sitting as a Court of Appeals, had exclusive and final jurisdiction in all matters of Equity cognizance. And Judges of the Law Courts sitting as an Appellate Court under the name of the Constitutional Court, held

like cognizance of all cases arising at Law. As might have been expected the two Courts occasionally differed, and amongst other things, on the question now before us.

In *Hall vs. Goodwyn and Moore*, 2 M'Cord, 383, decided in May, 1820, the Constitutional Court held, that a devise of lands without words of inheritance or perpetuity, vested only a life estate; and the case of *Jenkins vs. Clement and Deas*, Harper's Eq. Rep. 73, decided in 1824, the Court of Appeals in Equity in the construction of a clause in this identical will, expressed in precisely the same terms with that now under consideration, held unanimously, that the devise passed a fee, although there are no words of perpetuity or inheritance, and laid down the rule broadly that a general unqualified devise of lands, vested a fee simple. The two Courts were at variance on several other important points of law, and the rights of parties depended more upon the tribunal before which they were investigated, than any settled rule. This was an evil growing out of this double system of jurisprudence, and was too grievous to be long borne by the community, and the legislature as a partial remedy, undertook by the Act of Dec. 1824 to fix a rule and declare the law in most or all of the questions on which the two Courts had differed. By the 1st sec. of this act it is enacted, "that no words of limitation shall *hereafter* be necessary to convey an estate in fee simple by devise, but every gift of land by devise, shall be considered as a gift in fee simple, unless such a construction be inconsistent with the will of the testator expressed or implied."

It is agreed on all sides that in the construction of wills made subsequently to this act, the rule of construction presented by it is imperative, but the controversy here arises out of the circumstance that this will was executed, and that the testator died long before the

passing of the act, and it is considered that its application to this will would give the act a retrospective operation.

There is nothing in the terms of the act itself which shows that it was intended so to operate, and I concede fully the principle that in general the legislature cannot prescribe and establish a new rule, and give it retrospective operation. But I apprehend that where the rule is unascertained and unsettled, it belongs to the legislature to ascertain and settle the law, and that from necessity such a law must operate both prospectively and retrospectively. (a.)

The case under consideration will illustrate, I think, the existence and the necessity for such a principle. The will of the testator, Edward Wilkinson, contains amongst other things the following devise, viz. "My plantation on Slanns Island, I devise to my cousin, William Smith," and the question is, whether the devisee took a fee simple, or a life estate only. Before the act of 1824, the rule which prevailed in the Courts of Equity gave him the fee simple, and that which obtained in the Courts of law a life estate only. The respective Courts were equally supreme and independent in their respective departments, and each were governed by their own rules, but there was no common rule. The law of the land was unsettled and unascertained, and the act of 1824 was notoriously intended for that purpose. It is the fiat of the people acting through their representatives, as umpire between the clashing opinions of the two Courts, and must therefore be permitted to operate not as a new rule, originating in the act itself, but as a rule of the common law.

I was myself one of those who concurred in the rule laid down in the case of *Hall vs. Goodwyn and Moore*,

(a.) Vide ante *Hall vs. Goodwyn*, 442, and *Boatwright vs. Faust*, 489.

and my assent to the opinion expressed in that case, was founded upon mature reflection, and upon the fullest conviction, that it was in strict conformity with the settled rules of law, nor has any thing which has since occurred satisfied my judgment that I was mistaken. But the circumstances under which the act was passed, and the notorious fact that it was intended to secure a uniformity of decisions in the different Courts, leave no doubt that it was intended as a declaratory law; and however confident I may have been in my own opinions, I am constrained to yield to this high authority, and I do so with the less reluctance, from a knowledge of the truth on which the opinions of the Chancery Courts was founded, that where a limited estate was intended to be devised, it is almost if not universally expressed in appropriate terms, and the evil if one should arise out of it, will be very limited in extent.

This conclusion is, I think, warranted by, or rather necessarily grows out of the cases of *Taylor vs. Gibson*, and *Rose vs. Daniel*, 3 M'Cord 451. There the question was whether, when the statute of limitations had commenced to run, the intervening disabilities of infancy in a case of trespass to try titles, would avert its operation.— In the case of *Rose and Daniel* which had come up some years before, the Court held that it would, but in the subsequent case of *Faysoux vs. Prather*, 1 Nott & M'Cord, 296, that decision was reversed by three Judges to two, and one absent whose known opinion was with the minority. At a subsequent period, and when the Constitutional Court consisted of six judges, the old case of *Rose vs. Daniel*, and case of *Gibson vs. Taylor*, both came up on the same question, and the Court being equally divided were unable to pronounce any judgment, and they remained on the docket, when the act of 1824, above referred to, was passed, which also contains a clause declaring that

thereafter the statute of limitations should not be construed to defeat the rights of minors, when the statute had not barred the right in the lifetime of the ancestor, &c. and when the cases came on to be tried before this Court, the rule originally laid down in the case of *Rose vs. Daniel*, and in conformity with the act was adopted, and the reasons given are, that the divisions of the Court rendered the law uncertain, and the act was declaratory of what the law was; and that a different determination would drive the Court to the necessity of adopting a different rule for the cases under consideration, and those which *might* afterwards arise.

Now, regarding the case of *Hall vs. Goodwyn and Moore* as binding on the Courts of Law, a different rule, as has before been shewn, prevailed in the Courts of Equity, which rendered the law uncertain; so that it stood precisely in the same situation with the question in the cases of *Gibson vs. Taylor*, and *Rose vs. Daniel*, and all the reasons which operate to give effect to the act in one instance, apply with equal force to the other.

I am, therefore, of opinion, that the motion in this case should be granted, and that the *postea* should be delivered to defendant. *Judgment reversed.*

STATE VS. SHAW.

The City Court of Charleston has not jurisdiction over offenders for bringing Free Negroes into the City of Charleston, contrary to the Act of 1823, prohibiting their being brought into the State.

The defendant was indicted in the City Court of Charleston, for bringing a free negro into the State contrary to the act of 1823. The defendant was the Captain of a vessel which sailed from New-Hampshire, and entered the port and city of Charleston with a negro cook on board.

Clarke, for the defendant, objected to the jurisdiction of the City Court on the ground, that the only Court which had jurisdiction of the matter was the Circuit Court of the district, the offence having been consummated in the district, as soon as the vessel crossed the district line without the city, before the defendants entry into the city.

Holmes, contra.

Under the charge of the Recorder, the defendant was convicted, and this was a motion to quash the indictment in arrest of judgment, or for a new trial, on the ground taken before the Recorder.

CURIA *per* JOHNSON, J. The defendant entered the harbour of Charleston through the ordinary ship channel, and therefore passed the boundary of the State before he entered the corporate limits of the city, and hence it is concluded that the offence was complete before he entered the city, and that as the jurisdiction of the City Court is limited to cases *arising* within the city, consequently it had not jurisdiction of the case.

The jurisdiction of the Circuit Court being general, and that of the City Court limited *prima facie* the case belonged to the former, and the question will therefore be more conveniently considered by inquiring into the grounds on which it is claimed for the latter (the City Court.)

The act of 1818, confers on the City Court "jurisdiction of the Court of General Sessions, in all cases of misdemeanor, assault and battery, *arising within the city of Charleston*;" and supposing the offence charged in this indictment to be a misdemeanour within the meaning of the act, the question is raised, whether in point of fact the offence was committed, or in the terms of the act, *arose* within the city?

The act of 1823, which created this offence, declares, "that it shall not be lawful for any master or captain of

any vessel to introduce or bring into the *limits of this State* any free negro or person of colour, as a passenger, or as cook, steward, or in any other capacity on board of such vessel, &c. and inflicts a penalty of \$100 for the first offence. Now it is apparent that this offence was as fully consummated when the vessel was off Fort Moultrie, a point within the State and without the city, as if she had anchored and landed the negro at Bacon's bridge, the head of the Ashley river navigation, and consequently the offence was committed and completed without the limits of the city, and the jurisdiction of it belonged to the Circuit Court.

By the rules of the Common Law, one charged with an offence against the State, must be put on his trial in the county, (or to use a language more applicable to the state of things here,) in a Court having jurisdiction of the offence, and over the territory where it was committed; and although a rigid adherence to it was productive of so much inconvenience in particular cases, that the parliament of England found it necessary to make many exceptions, yet the Court, if it had the power, would not be inclined to do so in a case in which all the reasons of the general rule would apply.

The foundation of the rule is the supposed facilities which a Jury of the vicinage have in investigating and ascertaining the truth of the facts, and although in the present case it would not apply with all its force, yet in laying down a rule upon the subject, we must have a view to its general operation. If, for instance, the negro in question had been brought or introduced into the State through the north-western boundary of Pendleton District, and had found his way into the city by traversing the intervening space, a distance of more than 250 miles, and if, as I suppose, the offence was completed when he crossed the boundary, no one will deny that the reasons

of the rule would apply ; and although the circumstances may differ when he enters over the bar in view of the city, the principle is the same.

The rule is the same even in offences that are in their nature, in some degree, transitory, and is a matter of substance and not of form merely. The Common Law allows of but one exception, or rather modification of this rule, and that is the case of goods stolen in one county, and carried by the thief into another ; and this exception proceeds on the principle that the legal possession of the stolen goods still remains in the owner, and every moment's continuance of the trespass or felony, in legal contemplation, amounts to a new capture and asportation ; but in the case under consideration the offence consists in one act—the introducing or bringing a free negro, &c. into the State ; and although it may be repeated, it is, from its nature, incapable of a continuation ; for the act imposes no penalty for using or employing him when he is within the State. For the doctrine on the subject of the Venue—see 1 Chit. Crim. Law, 146–177.

Jurisdiction of the case is also claimed for the City Court, as being derived from the act of 1820, and I will now proceed to consider the foundation of that claim.

That act prohibits the bringing into the State of any free negro, or mulatto, by land or water, and imposes a penalty of \$500 on all persons offending against it, and to be recovered by action of debt, or by bill, plaint, or information, in any Court of Record having jurisdiction *of the amount*.” The act of 1823, on which this indictment is founded, is amendatory to this act, but makes no alteration as to the mode of proceeding, or on the subject of jurisdiction ; and I agree with the counsel opposed to the motion, that they are to be taken together and construed as one act, and that if the City Court had jurisdiction under the act of 1820, it is not taken away by the act of 1823.

All experience shows that there is a continued effort by Courts of subordinate and limited jurisdiction to extend their power beyond their legitimate limits ; and that that inclination is forced on them, rather by the convenience of suitors than by any disposition of the Courts themselves, is, I think, very apparent. But be the cause what it may, the necessity exists of imposing a restraint on this gradual and imperceptible extension of power, and this necessity has given rise to the rule that these powers should be determined by a rigid construction or implication.

It has been before shown that the City Court had not jurisdiction under the act of 1818, which limited it to the limits of the city, nor is it expressly conferred by the act of 1820 ; but it is claimed for it, as being a "Court of Record, having jurisdiction of the amount"—so that it is clearly an effort to extend by construction the territorial jurisdiction of the Court in consequence of having jurisdiction over the amount ; and by the same course of reasoning, the Court might entertain cases of any description to the amount within their jurisdiction, wherever they might originate, notwithstanding the restraints imposed by the act defining its powers.

Again—the Court of Equity has jurisdiction both over the territory, and of the amount, and being a Court of Record might, according to the argument for the same, and even stronger reasons, claim the right to entertain a prosecution under this act. But no one will pretend that it ought to be allowed. The jurisdiction of that Court is, by its organization and proceedings, confined to other subjects of litigation, and cannot, therefore, be extended to this.

The legislature may, it is true, authorize the venue to be laid, in any territory or jurisdiction within the limits of the State ; but when they create an offence without

referring it to a particular jurisdiction or territorial limits, the Common Law rule must prevail. The venue must be laid in the district, and the cause tried in the Court having jurisdiction of the offence and over the territory where it was committed. The motion to quash the indictment is therefore granted.

Indictment quashed.

SPENCER JOHN MAN vs. LOWDEN, assignee of P. COHEN.

Where the defendant had taken the benefit of the Insolvent Debtor's Act, in a suit by the plaintiff, he cannot again be held to bail for the same debt, unless the affidavit contains a specific charge of fraud in making his assignment.

At the suit of the plaintiff, the defendant had taken the benefit of the Insolvent Debtor's Act, and this was an action brought on that judgment. The defendant was held to bail, on the ordinary affidavit of the amount due. He moved to set aside the arrest on the ground of the former discharge. By the fifteenth clause of the act it is provided that, "in case it shall at any time after the discharge of such petitioner, appear that any such debtor did conceal any part of his estate, and not make a full surrender and delivery thereof, such debtor shall not be entitled to the benefit of this act, &c." The plaintiff offered to shew for cause against the discharge, that the defendant had not assigned all his property.

BAY, J. who heard the application, discharged the defendant, and this was a motion to set aside that decision, *Cross*, for the motion.

Lance, contra.

CURIA *per* NOTT, J. This case presents a single question on which the opinion of the Judge below must be supported, without going into a consideration of the several grounds made in the brief. By the fifteenth clause

of the act it is provided that, "in case it shall at any time after the discharge of such petitioner appear that any such debtor did conceal any part of his estate, and not make a full surrender and delivery thereof, such debtor shall not be entitled to the benefit of this act, &c." It is not provided in what manner the fraud is to be made to appear, nor by what process the party accused is to be deprived of the benefit of the act.—But there certainly must be some evidence of the fact. In the present case there was no charge that the defendant had concealed any part of his estate, or that he had not made a full surrender and delivery thereof. It is a simple affidavit in the usual form, annexed to the writ, stating that the defendant is indebted to the plaintiff in the sum therein mentioned. Instead of being subject to an arrest, on an ordinary affidavit to hold to bail, there ought at least to have been a specific charge of fraud, to have authorized such a proceeding; and that inference may be drawn from the first clause of the act, where, after requiring the debtor to deliver up all the goods, choses in action, &c. contained in his schedule within six months after his discharge, it goes on to provide that, "in case any such debtor shall neglect or refuse to do so, within the time aforesaid, it shall and may be lawful for the said Justices, upon the application upon oath of the said assignee, or assignees, again to remand the said debtor, or debtors, to prison, there to remain unless good cause shall be shewn to the contrary, &c."

I am of opinion that there was not sufficient cause shewn for arresting the defendant, and that he was therefore properly discharged.

Motion refused.

CITY COUNCIL vs. A. W. KING.

SAME vs. HENRY.

Where a person is sued by the City Council of Charleston, for the penalty for retailing without a license, in the City of Charleston, the Recorder has jurisdiction of the case, if the offence is committed within the City, whether the defendant resides in the City or not.

By the Act of 1223, the penalty must be sued for by the City Council, and a *qui tam* is not necessary.

Where a person is in the habit of using only initials for his christian name, and was so indicted, and it was proved that he was so known and called himself, and the fact whether he was so known is put in issue and the Jury convicts him, the Court will not interfere on that ground.

A man may take whatever name he pleases, and if he by his own conduct renders it doubtful what his real name is, the fault is his, and he must take the consequences.

In the suit by the City Council for the penalty for retailing, a citizen of the town, though one of the corporators, is a competent witness.

This was a suit on the part of the City Council of Charleston, against the defendant, for selling spirituous liquors within the City, without a license, contrary to the ordinance; penalty \$200.

The defendant plead in abatement, that his name was not A. W. King, but Alexander King. To this plaintiffs replied that he was as well known by one name as the other, which was proved. The defendant adduced no evidence, and his counsel contended that the initials of a name were no christian name, and that defendant must be sued by his christian name.

THE RECORDER overruled the plea, as defendant had himself given A. W. King as his name, and as it was not proved that A. W. was no christian name, nor indeed whether the defendant was or was not a Christian. Upon this expression of his opinion, *Cruger*, for the defendant obtained leave to plead the general issue. One Moses was then called as a witness, to prove the

fact of retailing. *Cruger* objected to his competency on the ground of his being one of the corporators for whose benefit the suit was instituted. The Recorder overruled the objection, stating the rule to be that when a corporator is incompetent on account of interest, it must be one of a personal kind, such as a right of common, &c.; but where only a corporate interest was in question, like the present, from which he could not receive the smallest pecuniary advantage, the witness was competent, and the objection must go to his credit.

The acts of retailing were then proved. The defendant objected that the suit should have been *Qui Tam*.—The Recorder overruled the objection, and the jury found for the plaintiff. In the case of *Henry*, the fact of retailing was proved by the City Marshal who released his interest. Defendant kept a store in Charleston, where the retailing took place. How long he resided there was not proved. A motion was made for a nonsuit, on the ground that the City Council could not maintain their suit in the City Court, or in their own name, as the action should have been *Qui Tam*; and secondly, because the residence of the defendant was not proved.

The first objection the Recorder overruled for the reasons stated by him on a similar motion in the case of the City Council vs. *Bartless*, April Term, 1826. The second, he also overruled as he had before done in other cases, because he thought that in the prosecution of offences against the bye-laws of the Corporation, the Recorder under the act of 1801 had jurisdiction, whether the defendant did or did not reside within the City, provided the offence was committed within the limits, for the restriction of residence appeared by that act to be confined to suits for money arising on contracts express or implied, and not for a breach of the bye-laws.

The Jury also found for the plaintiff in this case.

The cases were now taken up to this Court on the grounds made before the Recorder.

Cruger, for the appeal.

Haig, contra.

CURIA *per* COLCOCK, J. In this case the Court concur with the Recorder and the motion must be refused. The question of jurisdiction has long since been settled in the case of the City Council vs. Samuel Miller, decided at the January sitting of 1822. As to the objection to the form of action, that is completely put to rest by the act of 1823, which declares that the penalty shall be recovered by the City Council. The act gives to the city Council power to pass any ordinance or ordinances imposing penalties on retailers of spirituous liquors, without license, and then adds, and "to recover the same in the City Court, or other Court having jurisdiction of the amount of the penalty or penalties." And, therefore, the doctrine of the common law can have no application, for it will not be contended that the Legislature may not direct a mode of recovery different from that used in common, nor can it be seriously said that it is a matter of any importance in whose name the action is brought.

On the ground of misnomer, there is perhaps some room for doubt; but I think that as the matter was put in issue whether the defendant was known by the name of A. W. King, and had not in fact so called himself, and the jury have so found, the verdict ought not to be disturbed. And further enquiry by the Court, as to any legal view of the subject is precluded. It surely will not be contended here, that a man may not take any name he pleases, and if he by his own conduct renders it doubtful what his real name is, the fault is his, and let the consequences be also his. But in truth I know no law, nor do I see any reason why a man may not take the letters A. W. for his first name, or as it is generally called, his christian

name; for as there is no union here between Church and State, and no obligation on parents to baptize their children, this name may be as often changed as the patronymic, and although we know that letters are usually the initials of a name, yet if a person uses them and them only, it is difficult to perceive how his real name can be known, for if he is sued as Alexander William, he may say they mean Andrew William, or any other name which may begin with those letters.

It only remains then to examine the objections which were made to the competency of the witnesses. I begin with that which rested on the ground of their being citizens of the town, corporators, and I think I am within bounds when I say that the doctrine on this subject has been explicitly declared in a dozen or more opinions delivered by myself. That cases can be found which support the doctrine contended for by the defendant is readily admitted, but the doctrine has of late years undergone a very great and beneficial change, and the distinction between an interest in the question, and an interest in the event of the suit, between a positive and direct, and a remote or possible interest is now well established. Experience has proved that it is better to admit all the evidence which can be had, rather than exclude that which is liable to some objection, and therefore a mere bias, however strong, is not sufficient to exclude a witness. If the objection which I am now considering, were to prevail, all the City ordinances which impose penalties would be at an end—for who could be witnesses? But there are cases without number in which the point has been determined; See Phillips, 38, and the authorities there collected. And in addition to those, I refer more particularly to the cases, Falls & Smith vs. Belknap, 1 Johns. 486; Corwein vs. Hames, 11 Johns. 76; and Bloodgood vs. ——— of Jamaica, 12 Johns, 285.—

In this last case the objection was to a magistrate sitting in a case where one was sued *qui tam* for retailing liquors in the town, the penalty being given to the poor. It was held that though the Justice was an inhabitant of the town, his interest was too remote and contingent to afford a valid objection to his trying the cause. As to the objection to the City Marshal, that was certainly removed by the release which he made.

HUGER, J. who was sitting for Mr. Justice Johnson, absent from sickness, concurred.

NOTT, J. I am of opinion that the plea in abatement ought to have been allowed; in other respects I concur
Motion refused.

J. W. CLARK vs. THOMAS CREITZBURGH, JOHN S. LINSSER,
JOHN KENNEDY and JAMES NELSON.

To support an action for a libel, the plaintiff's name need not be mentioned in the writing, it is sufficient that there is a description of him, by which he may be known.

The plaintiff, in the month of March, 1824, being the owner of a drove of cattle, employed one John Thornton to slaughter them, and sell the beef in Charleston market. On the 30th March, Thornton issued the following advertisement:—"Fresh Beef in Market. My friend having brought in a drove of very superior Kentucky cattle, and the butchers refusing to give cost for them, I have (rather than see the stock sold below their real value) consented to butcher them, and offer them in the market, at stalls No. 27 and 45. The citizens and shippers will find it to their advantage to call and see for themselves, as they will get far better beef, and at a lower price than usual. John Thornton, March 30th."

On the next day the defendants published the following:—"Fellow-citizens, observing a piece in this

morning's Mercury, signed "John Thornton," who advertises fresh and cheap Kentucky beef, at stalls Nos. 27 and 45, at reduced prices, and stating his beef superior to what we have, and at a lower rate, it is false! Concerning that the butchers (as he vulgarly calls them) would not give a fair price for his friend's cattle, and he, a cobbler, would undertake to butcher them, and impose the murrain beef on our community as fresh and good, it can be proved that these fresh cattle have been dying a natural death as fast as possible since they arrived at this market, and our butchers would not have any thing to do with such sort of trash, as they are permanent victuallers, and not transient, as Mr. Thornton and his friend, who make their appearance but once a year, and then wish to poison the people of this city with their unwholesome meat. If the commissioners look into this business, they would prosecute the offenders and do the good citizens justice. Also, it is well known to most of the drovers who furnish this market from Kentucky, that when their cattle are fresh and in good order, they get generous prices for their stock, or they would not take the trouble of driving them repeatedly to this market, and return home satisfied.— (Signed,) Many Victuallers. Charleston, March 30th, 1824."

On this publication, the plaintiff brought an action on the case for a libel against the defendants, who were butchers in Charleston.

It was proved that the advertisement complained of as libellous was published by the defendants, and that the charges against Clark's beef was untrue. The commissioners of the market had examined into the matter, and had made a publication favorable to his beef. Many of the witnesses knew Clark as concerned with Thornton, really as the owner of the cattle, they being butchered by Thornton for Clark. The beef was good, and the sale of

it much injured by the publication of the butchers. It was cheaper than that of the butchers.

The defendant moved for a nonsuit on the ground, that the description of the individual alluded to in the advertisement of "Many Victuallers," as *Thornton's friend*, was so vague that extrinsic evidence was inadmissible to shew who was the person meant.

His honour, Mr. Justice *Waties*, granted the nonsuit, assigning the following reasons :

WATIES, J. It is with reluctance that I grant a nonsuit in this case, as I do not like to withdraw the evidence from a Jury ; but the ground on which it is moved for, appears to me to require it.

The action is brought for a libel on the plaintiff, but he is not named in it, nor is he described in any way, which obviously points him out as the person intended. The libel charges "John Thornton and *his friend* with wishing to poison the people of the city with their unwholesome meat;" but it is not shewn that the application of his "friend" was understood by the public to mean the plaintiff, Clark. No witness has said that he so understood it, and I think this essentially requisite to support the action.

The mischief of a libel consists in designating so plainly the person who is the object of it, as to expose him to public odium or ridicule ; but the application of the "friend of Thornton," could not be considered as exclusively applicable to Clark, for Thornton may have had other friends ; and it is an important fact, testified by him, that the butchers frequently accused one Randolph, (who was concerned with him,) as well as Clark, for forestalling the market, which made the allusion more ambiguous.

It is to be regretted, that instead of this action, the plaintiff had not brought a special one on the case, for it

is fully proved that he had sustained material injury from the unwarrantable and malicious combination of the defendants.

Petigru & Harper, for the plaintiff, now moved to set aside the nonsuit. The case should have been submitted to the Jury. There was no doubt upon the evidence, as before the Court below, that the libel was published maliciously of the plaintiff, and that he had been injured; and extrinsic evidence was competent to shew who was the person meant as the friend of Thornton. No libel can be so vague that it may not be rendered certain by averments and proofs. The description is certain, though the name is not mentioned. Suppose a person publish that a certain man is a thief, and afterwards say he meant a certain person by name, may not his declarations be given in evidence.

De Saussure & Lance, for the defendants. It was not sufficient to charge, that the plaintiff wished to sell murrain beef, but it must be charged that the act was done; and as the defendants prevented it, it was no libel.—1 Com. Dig. 393, F. (14); 2 Esp. 89, 101; 3 Black. Comm. 125; Phil. Ev. 97; 4 Com. 1004.

CURIA *per* JOHNSON, J. The ground upon which it is understood the nonsuit in this case proceeded, was, that there was nothing in the paper writing declared to be libellous, which pointed out the plaintiff as the person alluded to under the appellation of the "friend of John Thornton," and the total absence of any proof aliunde that he was intended to be designated by that term. In the argument here, the counsel opposed to the motion. have further contended that it is so uncertain as to be incapable of being rendered so by evidence aliunde; and they refer to a class of cases collected in Com. Dig. title Action on the Case for defamation, E. (14.) in which the general rule is, that if words are uncertain and cannot

designate a particular person, no averment shall make them actionable; as if one say of three witnesses, one of you is perjured, none of them shall have an action, because of the impossibility of ascertaining which one is meant. But I believe it never has been doubted that if an individual is pointed at, either by signs, paintings, or descriptions, he who can bring himself within them, may maintain an action; and the universal rule is that if the person can be ascertained it is wholly immaterial whether he be described directly or indirectly. As if one say to a servant "thou servest a traitor," the master shall have an action. So if one say "this baker hath perjured himself," A. a baker shall have an action with an averment that the speaking was of him. (Com. Dig. Tit. Action on the Case for defamation, E. 14.)

So much for the rule; we will now consider of the evidence. The witness, John Thornton, leaves no doubt as to whom he alluded in the printed advertisement of the 20th March by the appellation of "my friend." It states unequivocally that it was the plaintiff who brought the cattle to market, and at whose request he consented to butcher them and offer them for sale. The supposed libel or publication is professedly a direct reply to Thornton's note, and it appears to me that there can be as little doubt that the person of the plaintiff was as well designated by the terms *Mr. Thornton and his friend*, as Thornton was himself. The evidence appears to me to be plenary; but if it admitted of a doubt the Jury ought to have been charged with the fact.

There is another view of this subject. The last count in the declaration lays a *per quod*, the plaintiff was hindered from, and lossed on, the sale of his beef. This was a special injury sustained by the plaintiff, and whether the defendants designed it or not as an injury to him, the act was unlawful and they are answerable for the conse-

quences. I would compare it to the case of one lying in wait to beat an enemy, and by mistake he falls upon a friend and beats him; now here it is very clear that it would be no answer to an action brought by the friend that the injury was intended for another.

Nonsuit set aside.

**JOSEPH & DANIEL BLAKE vs. F. G. DE LIESSELINE,
Sheriff Charleston District.**

Every ground of appeal ought to be so distinctly stated, that the Court may at once see the point which it is called upon to decide, otherwise the Court does not feel itself bound to decide any question raised under such indefinite specifications.

If the tenant consents to the landlords impounding goods distrained on the premises, a person who rescues them cannot make that objection when sued for the rescue.

There is no fixed period, after which a person may not distrain goods on the premises for rent in arrear; nor will a prior dormant execution, take the money in preference to the distress.

If the execution had been levied before the distress, or even if it had been issued before, and had been in active operation, it might have been otherwise.

In an action for a rescue by the landlord who has distrained the goods, though he cannot recover interest, as a matter of course, yet the jury may make the rate of interest the measure of damages.

The Court having allowed interest by its judgment on special verdict, judgment ordered to be set aside unless the plaintiff release the interest.

The facts in this case were stated by the following special verdict of the jury.

“We find that Humphrey Courteney was tenant to William Blake, of a certain house and lot in meeting street, in the City of Charleston, for several years prior to the 9th June 1823; that the said William Blake duly made and executed his last will and testament, wherein he devised the said premises to the plaintiffs, as tenants in common, and on the 9th June aforesaid, departed this life, leaving the said will in full force, and unrevoked:

that the said H. Courtenay continued on the said premises as tenant to the plaintiffs under demise from the said Wm. Blake, at the yearly rent of £120, payable quarterly, of which said rent the sum \$—— principal, and of \$—— for interest, (according to the agreement between the said H. Courtenay and the plaintiffs,) making a total of \$7037 77, on the 1st April, 1824, was due and in arrear from the said H. Courtenay to the plaintiffs. And the Jury further find that on the 13th day of April, 1821, Thomas Parker, the legally constituted attorney for the plaintiffs, duly executed a warrant of distress, and duly appointed John Bonner, a deputy of the sheriff, the bailiff of the plaintiffs in that behalf, on the 14th April, distrained on all the goods and chattels, stock in trade, and furniture of the said H. Courtenay on the demised premises, which were duly appraised, and with the consent of the said H. Courtenay impounded on the premises, being the dwelling house of the said H. Courtenay. And the Jury further find, that on the 16th April, in the year last aforesaid, William Wightman entered up a judgment in the office of the Clerk of the Court of Common Pleas for Charleston District, for the sum of \$38,268, and on the same day took out an execution, and lodged the same in the office of the defendant, then being sheriff of Charleston District, and that the said goods and chattels, stock in trade, &c. so being impounded and in the custody of the bailiff aforesaid, the said defendant notwithstanding he was notified that the said goods were seized and impounded under a warrant of distress, and was warned if he did take the said goods and chattels, stock and furniture out of the possession of the said bailiff, he would do so against the assent of the plaintiffs, and only by force of his official power and at his peril, did nevertheless on the 19th April, levy on the said goods, stock and furniture, and took the same out of the custody of the said bailiff,

and on the 8th day of May ensuing, did sell the said goods, stock in trade, and furniture, under the execution and levy aforesaid, the nett proceeds of which sale amounted to the sum of \$3276 77. And the jury further find that previous to the levy aforesaid, the amount of one year's rent was tendered to the agent of the plaintiffs, as a full satisfaction of their claim for rent, which was refused, but the said sum has never been paid into Court. And the Jury also find, that the said defendant having been served with a rule to shew cause why an attachment should not issue against him for not having paid the said sum of \$3276 77 into Court, shewed no sufficient cause against the said rule, and on the — day of — 182—, and order for an attachment to issue was made, but the said defendant confessing, that he had otherwise appropriated the money, and had not the means to raise the sum, the attachment was not enforced against him. And the jurors further find, that evidence was produced (subject however, to legal exceptions,) by which it appears there were other judgments and executions than that of Wm. Wightman remaining on record, apparently unsatisfied, to a much larger amount than the whole proceeds of the property levied on under the distress; which said judgments and executions were prior to the distress warrant and judgment of Wm. Wightman, but of these prior executions, there were none which had been renewed and lodged in the office of the sheriff of the said district within a year and a day previous to the distress warrant and levy aforesaid. Under this statement of facts, if the Court shall be of opinion that the plaintiffs had no right to distrain for more than one year's rent, or having a right to distrain for the whole amount of rent in arrear, if the Court shall be of opinion that the executions offered in evidence were legally admissible, and that they have a prior lien on the said goods, then we find for the plain-

riffs five hundred and fourteen dollars twenty eight cents, being the amount of one year's rent, with interest from the date of the sale under the execution. If the Court shall decide that the plaintiffs are entitled thereto. Or from the date of the order for the attachment, or without interest as the Court shall determine. But if the Court shall be of opinion that the plaintiffs' distress for the whole amount of rent in arrear, is legal, and that the executions offered in evidence, either were inadmissible, or being admissible have no prior lien or right against the plaintiffs distress, then we find for the plaintiffs three thousand two hundred and seventy six dollars and seventy seven cents, the nett sales of the goods distrained upon and sold by the defendant, as single damages, with or without interest, as in the case of the one year's rent, is above found by the Jury."

On motion of *Grimke*, judgment was entered up for the plaintiffs on the special verdict for the sum of \$2276 77, with interest thereon from 21st April, 1821, and costs of suit; and judgments under the statute against the defendant for triple damages and costs.

From the judgment of the Circuit Court, the defendant appealed on the grounds,

1. That under the facts found by the special verdict, the plaintiffs ought to have been nonsuited.

2. That at all events the plaintiffs were entitled only to one year's rent, which was tendered to them.

3. That as one year's rent was tendered to them, they were not entitled to interest thereon.

4. That the plaintiffs were not entitled to triple damages.

CURIA *per* NOTT, J. The first ground relied on in this case is too general to afford the party any prospect of success. Every ground of appeal ought to be so distinctly stated, that the Court may at once see the point which

they are called upon to decide, and without such specification we do not consider ourselves bound to decide any question which may be raised out of so general and undefined a charge. In the argument it has been contended that the bailiff had no right to impound the goods on the premises and therefore the defendant could not be guilty of a rescous in taking them away, but to that it is sufficient to say, that if the tenant consented, it does not lie in the mouth of the defendant to raise the objection.

With regard to the second question, there does not appear to be any fixed period, after which a person may not distrain for rent in arrear. In the case of *Braithwaite vs. Cooksey*, it was held that a person might distrain for all the rent due for six years; 1 H. Black, 465. In the case *ex parte Grove* 1 Atk. 104, the party distrained for twelve years rent, although, it was disallowed on another ground, it did not appear that the length of time would have been a bar. Numerous other cases might be adduced to the same effect. If the execution had been levied before the distress, it might have been otherwise, or even if it had been issued before, and had then been in active operation; but a dormant execution, though it might be entitled to money properly received on a junior execution cannot sanctify a levy otherwise illegal.

If the rent of one year had been all to which the plaintiffs were entitled, they would not have been entitled to interest after having refused to accept the principal when tendered to them, but as they were authorized to distrain for all the rent in arrear, which was more than the whole value of the goods distrained, they were entitled to a full remuneration for the damages which they sustained by the rescous. And although strictly they are not entitled to interest, yet the Jury might make the rate of interest the measure of damages. And if they had done so, I think it must have been allowed by the Court: but I

do not think that interest follows as a matter of course, and therefore cannot be allowed on this verdict. I am also of opinion that under the statute the plaintiff is entitled to treble damages. But as the plaintiff has entered up his judgment on the opinion of the Judge below, for the interest allowed on the damages, the judgment must be set aside unless the plaintiff will remit that part of it; in which case it may remain undisturbed.

Judgment reversed nisi.

WILLIAM WALTON, Assignee, vs. JOHN OSWALD.

Where a defendant is in the prison bounds under Ca. Sa. and he is discharged by the plaintiff it releases the surety to the prison bounds.

The discharge to release the surety need not be in writing.

A direction from the plaintiff, by his agent, to the sheriff *to stay proceedings* against the defendant, who is in the prison bounds, is a sufficient authority to the sheriff to discharge the defendant.

This was an action of debt on a Prison Bounds Bond. The declaration set forth that the plaintiff, as survivor of William Walton & Co. on the first of June, 1818, in Colleton District, recovered a judgment against Wm. Youngblood, and afterwards, on the 25th January, 1823, issued a Ca. Sa. under which Youngblood was arrested, and on the 12th of April, 1823, the defendant, as his surety for the bounds, signed the bond upon which this action was brought. The allegation of the breach of the condition of the bond was admitted by the plea of the defendant, who justified under a licence from the plaintiff, which was denied by the replication, and upon this point the parties joined issue. The plaintiff's case being admitted by the pleadings, the defendant proved by the sheriff of Colleton District that in consequence of a letter dated the 17th April, 1823, from Robert Martin, as attorney of Aiken, (the real plaintiff) directing him as

sheriff to "*stay proceeding in Walton's case*," he discharged Youngblood from arrest, under the act of 1815; but he produced no writing shewing that Youngblood consented to this discharge, but the witness stated that he had done so orally. The defendant also offered to go into evidence to shew that Youngblood was, at the time of his arrest, and had been ever since, totally insolvent.—The evidence was objected to by the plaintiff, but the objection was overruled by HUGER, J. and the Jury found a verdict for the defendant.

Grimke, for the plaintiff now moved for a new trial, on the grounds, that the testimony of the defendant was insufficient to prove that Youngblood was discharged under the act of 1815, his consent to the discharge not being in writing, and that the evidence of Youngblood's insolvency was inadmissible.

He referred to the case of *Miller, assignee, vs. Bagwell*, 3d M'Cord, p. 429, where it is decided "that the sureties to a prison bounds bond, cannot discharge themselves by a surrender of their principal to the sheriff." If the surety in whose custody Youngblood was, could not surrender him a fortiori, the sheriff could not discharge him, either under the act of 1815, or in any other way. Besides he was not in the custody of the sheriff, and under the above decision he never could return to the custody of the sheriff. The sheriff, therefore, could do no act *as sheriff*, and none but the sheriff can discharge under the act. If the sheriff had not the power to discharge, the authority relied upon, to wit, the letter from Martin, (the agent of the real plaintiff,) clearly could not invest him with the power to discharge Youngblood, and his leaving the bounds was a breach of the condition of the bond which, ipso facto became forfeited to the plaintiff.

Elmore, contra.

CURIA *per* NOTT, J. I do not discover any good ground for a new trial in this case. It is not material whether the case comes within the provisions of the act of 1815, or not. For if Youngblood was discharged from confinement or from the prison bounds by the directions of the plaintiff or his agent, it was a release of the surety, and the authority of the agent is not questioned. The order to the sheriff is not very explicit; it is that he should "stay proceedings" against him. It was known that he was then in actual custody, and to stay proceedings, must mean to cease to hold him in custody, or it could mean nothing. The sheriff had a right to give it that construction. The decision in the case of Miller and Bagwell, in 3d M'Cord, does not reach this case. The Court then held that the surety to the sheriff could not surrender his principal. That is no part of the condition of the bond. The object of the bond is to indemnify the sheriff against an escape. But we have never held that if the sheriff discharge the prisoner himself, that it will not release the surety, although he may make himself liable. I am of opinion, therefore, that the motion ought to be refused. *New trial refused.*

THOMAS GILLESPIE, Endorsee, vs. RIPPON HANNAHAN,
Indorser.

If the drawer of a Note remains in the State, and has only changed his residence, the holder must find him out and make his demand to charge the indorser upon non-payment; but if he has removed to a foreign country, the holder is excused from making a demand.

If the drawer is absent in any other State of the United States; he is considered as in a foreign State.

This was a summary process brought by the plaintiff as the indorsee against the defendant as the indorser of a promissory note, drawn by one Otis P. Prescott.

The evidence of demand and notice was contained in the protest of the notary, which stated that on the day the note became due the notary made diligent inquiry for Prescott, and ascertained that he had no residence in Charleston, and was supposed to have gone to Philadelphia, and that he, on the same day, left a written notice of the non-payment of the note at the residence of the defendant, the indorser, (he not being at home.) Upon this evidence, RICHARDSON, J. decreed for the defendant; on the ground that there was not sufficient evidence of a demand upon the maker of the note and notice of non-payment to the indorser.

This was a motion to reverse the decision of his Honour, on the ground—That it was not necessary to charge the indorser in this case, that a personal demand should have been made of the drawer, he having removed beyond the limits of the State, to wit, to Philadelphia.

Rice, for the motion, cited 4 Mass. 45; 6 Mass. 445; 2 Cains, 121; 6 Mass. 384; 2 John. 274; 14 John. 114; *Galpin vs. Hard*, 3 M'Cord, 394.

H. A. De Saussure, contra. *Halls, Kirkpatrick & Co. vs. Howell*, Harper 426.

CURIA *per* JOHNSON, J. This case has been argued upon the assumption, that at the time the defendant indorsed and transferred the note in question to the plaintiff, Prescott, the maker was resident in Charleston; and although this fact is not distinctly stated in the protest which seems to have been received as evidence of every thing it contained, I think from the terms used it may fairly be inferred, and in the determination of the case I shall take it for granted.

The case of *Halls, Kirkpatrick & Co. vs. Howell*, (Harper Rep. 426,) is decisive that a written demand of payment from the maker of a promissory note, transmit-

ted by mail, is not sufficient to charge the indorser ; so that the notice, or demand, sent by mail to Philadelphia, whither it was supposed Prescott, the drawer, had gone, is altogether unavailing, and the case is resolved into the question, whether Prescot, having no place of residence in Charleston, and having left there and gone to Philadelphia before the note fell due, dispensed with a demand of payment?

An indorsement in the ordinary form, is nothing more than a request of the payee of a note, that the maker will pay to the indorsee the contents, according to the tenor of the note ; but as a contract between the indorser and indorsee, much more is implied than is expressed. It imposes on the indorsee the obligation of presenting the note to the maker for payment, and in its legal effect obliges the indorser to pay the amount, if the maker does not. These are the general obligations and liabilities ; but the usages of merchants who principally deal in the medium of exchange, have made them to depend on a great variety of circumstances, and which necessarily enter into them. Thus, if a demand on the maker had become from any cause impossible, it would be unreasonable to exact the implied obligation of the indorsee.— And so, if the indorsee should delay the demand of payment, or notice to the indorser for an unreasonable time, and until the maker had become insolvent it would be equally unjust that his liability to pay the note should be enforced. And although many of the rules which have grown out of this system, when viewed singly and in the abstract would appear arbitrary and unreasonable, yet when taken in connexion with the system, it will be found that they are based on the precepts of natural justice, or are calculated to subserve the great purposes of commerce.

Now I take it that there is nothing in the principles of justice which would require the indorsee to make a de-

made, when, as in the case of *Putnam vs. ———*, 4 Mass. 53, it had become impracticable, the maker having absconded. Nor can I perceive in what way it would promote commerce.—But on the contrary, that rule which enjoined the performance of impossibilities, would deter the most hardy and adventurous from placing themselves within its operation. And it seems to be generally agreed, that the absconding of the maker of a note, or the acceptor of a bill of exchange, will excuse the holder from making a demand, (see Baylie on Bills, 95; Lord Ray. 743,) and where he has left the country for any cause whatever, presentment and demand of payment of his wife or agent, at the place where he formerly resided would be sufficient, (2 Esp. Rep. 511; 2 Taunt. 206.) These cases, I think, establish very clearly the principle that, where a demand has become impossible, or impracticable and unreasonable, it will be dispensed with. And the great difficulty is in laying down a precise rule, as to what circumstances shall, or shall not excuse it. I have not been able to lay my hand on any case which has decidedly marked out the line. In the case of *Widgery vs. Monroe*, 6 Mass. 451, the Court, it is true, say passingly, that if on the day the note becomes due the maker is out of the country, the plaintiff would be excused from making the demand, and yet it would seem unreasonable, that when he had only removed across an imaginary line separating two countries, that it should be dispensed with.—It is equally unreasonable that the holder should be compelled to follow him to St. Petersburg for that purpose.

+ The necessity of a certain rule leaves no alternative, but the adoption of one or the other of these extremes.—There can be no compromise between them, that will not work injustice; as it must remain a matter of discretion, and in this dilemma I cannot hesitate to adopt the suggestion in the case of *Widgery vs. Monroe*.

For all legal purposes a neighbouring State is regarded as a foreign country. Bills drawn on a sister State are regarded as foreign bills; and the terms beyond the seas, used in the stat. of limitations, have in construction been applied to a neighbouring State, and I come to the conclusion that, for the purposes of a demand on the maker of a promissory note, it must be so regarded, and that his absence from the State in which the note was made, and where it was understood it was to be paid, will excuse the holder from making a personal demand in order to charge the indorser. Considerable reliance has been placed on the case of *Collins vs. Butler*, 2 Str. 1087, cited in *Baylie* 95, where it is said, that if the drawee has merely removed from the place in which the bills represents him to reside, it is incumbent on the holder to use every reasonable diligence to find out where he is, and if he succeeds, to present it for payment at that place. But this must be understood with some exceptions; for it never could have been intended to require that he should follow him to the end of the earth; and it is clearly reconcilable with the views taken. If he remains in the country, and has only changed his residence, then the holder must find him out, and make his demand, but if he has removed to a foreign country, he is excused.

The presiding Judge founds his judgment on the insufficiency—1st. Of the demand on the maker; and, 2d. Of the notice of refusal to pay to the indorser, the defendant. The first has been already disposed of, and the facts stated in the protest in relation to the latter are, that the notary called twice at his place of residence, and not finding him at home, left a written notice.—Clearly this was sufficient. (*Vide Chitty on Bills*, 332–3.) Decree reversed and new trial granted.

Decree reversed.

ALEXANDER BLACK, survivor ads. SAM'L. HYAMS, Jaoler.

Where a defendant takes the benefit of the insolvent debtors act, and does not assign enough to pay the Gaoler's fees, he may recover them of the plaintiff at whose suit he was confined.

This was a suit by sum. pro. in the nature of a special action on the case, for gaoler's fees, for the maintenance of a prisoner arrested at the suit of the present defendant. The prisoner had been discharged under the insolvent debtors act, after a suggestion of fraud had been filed against him, and finally overruled. By his schedule it appeared that he had surrendered nothing but a few cloths. The prisoner appeared to be so poor whilst in gaol as to be unable even to pay for the postage of a letter which had been addressed to him.

The defendant contended that before he could be made liable in this case, the plaintiff was bound under the act of 1817 to prove the prisoner's inability or refusal to pay as well as that the assignees had not sufficient to pay the fees. That no demand on or refusal by the prisoner had been proved, nor in fact any inability on his part, (for it was contended that the schedule and admission to the benefit of the Act, were not sufficient for that purpose,) though it was true that the assignees took nothing under the schedule. That the defendant was now ready and offered to prove that the prisoner had in fact funds at that time, and that his schedule was fraudulent. This proof the Recorder ruled to be inadmissible in this suit, and thought the right of the gaoler sufficiently established under the act of 1817, without proving a refusal, as that might, if necessary, be presumed; for it appeared that the assignees had not sufficient to pay the fees. That if the schedule was really false, it was incumbent on the present defendant, at whose suit the prisoner had been taken, to have proved it when he filed his suggestion, and that the Recorder's order for his discharge, and that without appeal,

established the *bona fide* insolvency of the prisoner and the correctness of his schedule, the effect of which he thought him precluded from questioning in this suit, and he decided for the plaintiff.

Eckhard, for the defendant appealed.

Toomer, contra.

The Court affirmed the judgment of the Recorder.

Judgment affirmed.

Assignees of JACOB COHEN vs. Assignees of J. M. GRIER.

An execution loses its lien on the property of the defendant when his body is taken under a Ca. Sa. and if an assignment is made under the prison bounds act, the oldest fi. fa. though it be junior to the execution under which the body is taken has the first lien.

The other judgment creditors having issued out writs of fi. fa. before they had taken out writs of ca. sa. do not thereby retain their liens.

It appeared in this case that Grier had been taken on several executions, (ca. sa's.) at the instance of his elder execution creditors, who had first issued fi. fa's. and then the ca. sa's. under which he was taken. He had assigned over property pursuant to the provisions of the prison bounds act, for the purpose of satisfying these demands.

The plaintiff now came in as having the oldest remaining fi. fa. and claimed the proceeds of the property assigned, or so much of it as would be sufficient to satisfy his execution; and the question was, whether the elder creditors by taking the body, lost their liens on the property, so as to permit the next fi. fa. to come in and take a preference..

RICHARDSON, J. ordered the money to be paid over to the oldest fi. fa. creditor in preference to the ca. sa. creditors.

From this order the assignees of Grier appealed.

John L. Wilson for the appellant, contended that His Honour mistook the clear expressions of the prison bounds act, and confounded the same with the insolvent debtors act. The prison bounds act makes the law for the distribution of the effects of the person taking the benefit of it, and the assignees cannot go contrary to that law. The prison bounds act, protects prior incumbrances, and a discharge under that subjects the property to the conditions of that act. If the prison bounds act conflicts with the insolvent debtors act, or the common law, both are repealed *pro tanto*.

CURIA *per* NOTT, J. In the case of *Mairs and Smith, 3 M'Cord, 54*, it was decided that an assignment under the insolvent debtors act, did not effect liens which had already attached, but that the lien was lost by taking the body, and I cannot discover any distinction in the two cases. Indeed the claim of the *fi. fa.* creditor is stronger in this case, because the act expressly declares that the assignees shall take "subject to all prior incumbrances," and so soon as the body of the defendant was taken in execution and the elder liens destroyed, the *fi. fa.* next in order immediately attached and became an incumbrance on the property. Suppose the defendant had not surrendered his property at all, the *fi. fa.* creditors might have proceeded with their executions, and the surrender of the property by the defendant could not deprive them of that right. I am of opinion, therefore, that the judge below decided correctly in ordering the money to be paid over to the *fi. fa.* and the motion to reverse the decision must be refused. I entertain some doubt with regard to the correctness of this mode of proceeding, but as the party against whom it is taken has consented, I did not feel disposed to raise the objection myself. *Motion refused.*

JOHN MONEY vs. THE UNION INSURANCE COMPANY.

It is not a breach of warranty, on a policy "at and from Charleston to Marseilles," that the vessel had been laden at Havana, a belligerent port; but whether the facts constituted a misrepresentation or not was for the jury.

A fact known to the underwriters need not be stated in the offer.

This action was brought on the following policy of insurance on the schooner John, "lost or not lost at and from Charleston to Marseilles, and at and from thence to Havana," it was dated on the 13th August, 1818. On the same day a policy was subscribed on goods consisting of boxes of sugar and logwood, valued at \$2000 "lost or not lost at and from Charleston to Marseilles," beginning the adventure from and immediately following the loading thereof on board the said vessel at Charleston, to continue and endure until the said goods be landed safely at Marseilles. In case of loss it is agreed that said property being neutral, be warranted free of any charge, damage or loss which may ensue in consequence of any seizure or detention for or on account of any illicit or prohibited trade, or in any trade of articles contraband of war. In case the risk upon the policy does not take place, the premium is to be returned except $\frac{1}{2}$ per cent. On the day before these policies were subscribed, viz. 12th Aug. 1818, the following information was communicated by all the morning papers of the city of Charleston, viz. "Yesterday arrived schr. John, Conckling, Havana, five days. Sugar and Fruit, to John Stoney, and will sail in a few days for Gibraltar and a market." These papers were taken by the Company. On the same day the following offer was submitted to the Company. "\$500 on vessel, estimated if sold for cash, at \$——. \$2000 on goods consisting of boxes of Sugar and Logwood. The above sums are offered for Insurance by John Stoney, on account of J. Marks & Brooks,

(citizens of the U. States:) per the American schr. John, Beth. Conckling, master, on the vessel from Charleston to Marseilles, and at and from thence back to Havana, and on the goods from Charleston to Marseilles." "The said vessel at Charleston this day, intended to sail in or about four days. N. B. Every circumstance material for the underwriters to know, so as to form a just opinion of the above risk, is stated in the above offer. Charleston, 12th Aug. 1818. Signed, John Stoney, per J. Pritchard."—"The premium on the above vessel was fixed by the President and Directors of the Union Insurance Company, at their Office in Charleston, this 12th Aug. 1818, at and after the rate of 2 per cent out, and 4 per cent out and to Havana. Signed, David Alexander, President."

On the 19th Aug. the morning papers stated,—“Schr. John, ———, from Havana, for Gibraltar and a market, went to sea yesterday.”

“The manifest and report of the cargo laden at the port of Havana, on board the schr, John, B. Conckling master, bound for Charleston, Gibraltar and Marseilles.

144 boxes Sugar shipped by Antonio De Frias, & Co.

26 do. do. do.

40 do. do. do. Havana, 4th Aug. 1818.

Bill of Lading. Shipped per John, ———, by order and for Messrs. Marks & Brooks,

16 boxes Sugar.

10 do. brown Sugar.

1 do. do. do.

2 tons Longwood.

To be delivered to M. Autrey & Co. Marseilles.

(Signed,) B. CONCKLING.”

The Collector's certificate, shewing she got a Mediterranean pass in Charleston was also produced. The John had been in Charleston in June; she was on the

Company's books ranking No. 1; she arrived in safety at Marseilles, and delivered her cargo; she sailed from Marseilles for the Havana, and was lost; no offer to return the premium on the goods had ever been made. At the time of her leaving the Havana, Spain and her South American colonies were at war. Cuba, of which Havana is the Capital, adhered to the mother country. The South American colonies had privateers at sea. It was stated that only Spanish subjects could by the laws of Spain ship goods from the Havana. Several members of the Insurance Company declared their ignorance of the notice in the morning papers of the 12th Aug. They were of opinion that the risk was increased by the cargo having been taken in at the Havana. Other witnesses thought that the company must have seen the advertisement and that the risk was not increased. The property insured (goods and schooner) appeared to be American.

Under these circumstances it was contended that the plaintiff could not recover.

1st. Because there was a breach of the warranty; and

2ndly, If the Court should be of opinion that there was no breach of the warranty, that there was a misrepresentation, as the offer did not state that the cargo had been taken in at the Havana, and that this was a fact material to the risk, and ought to have been communicated, whether known or unknown to the insurer; and that were this fact one which need not have been communicated if known, yet that from the evidence it could not have been inferred that it was known.

His Honour, Mr. Justice GAILLARD, who tried the cause, was of opinion that the case made out was in all respects similar to the cases which had been submitted to this Court on former appeals; (Harper's L. R, 235; 3 M'Cord, 387,) and directed the Jury to find a verdict for

the defendants in conformity with the opinions declared in those cases. The Jury, however, found a verdict for the plaintiff and from their verdict the defendants appealed and made these points.

1st. That there was a breach of warranty.

2nd. If not, that there was a misrepresentation.

Hunt, for the motion.

Toomer, contra.

CURIA per HUGER, J. (sitting for Johnson, J.) The words of the policy on the vessel are, "lost or not lost at and from Charleston to Marseilles, and at and from thence to Havana." These words, by themselves, do not import that the vessel had or had not goods on board, nor do they imply that goods were to be put on board.—They express no other fact but the vessel's being at Charleston and about to sail, and such was the fact. She was at Charleston; nor do these words taken in connexion with any others in the policy, imply that she had not taken goods on board at Charleston. If the words *to load* had been inserted, the policy would not have attached until she did load; for however immaterial to the risk such a loading may have been, yet having been inserted in the warranty, it would have been regarded as a part of the contract; and therefore binding. But neither the words *to load* nor any other equivalent words are to be found in the policy. Had the construction contended for by the defendants been ever given to these words in any policy, (on a vessel alone) when no question as to an average loss could arise, it might have been inferred that such was the intention of the parties to the policy in question; but no such case has been produced. On the contrary, it does appear from the decision of this Court on the first appeal in this case, that the construction contended for was not tenable. The Judge who delivered the opinion of the Court of Appeals (then called the Consti-

tutional Court,) and who had tried the case on the Circuit, expressly stated that a new trial was ordered by the Court because they were not satisfied with the finding of the Jury on the question of misrepresentation. This would not have been done had the Court been satisfied that there was no breach of warranty. It is true the Court did not say it in so many words, that there was no breach of warranty, but what they did was equivalent thereto. Nor can it be supposed to have been overlooked by the counsel concerned, or neglected by the members of the Court. The argument reported negatives the first, and the opinion of the presiding Judge the last. I was present when the case was argued, and signed the opinion of the Court, and I feel confident that the case was regarded as turning entirely on the question whether the insurers knew, when the policy was signed, that the loading had been in the Havana. The Court were not satisfied that the evidence reported authorised the conclusion drawn by the Jury. It was therefore sent back for their reconsideration. On the second trial of the case I presided. A breach of the warranty was again insisted upon, as well as a misrepresentation. I then ruled that there had been no breach, and that the only question was whether there had been a misrepresentation. Again a verdict was returned for the plaintiff, from which an appeal was again taken to this Court, on all the former grounds; and again this Court sent it back, because, in their opinion, there had been a misrepresentation. Not a word was said by the Court as to the warranty; on the contrary, the Judge says he will express no opinion on any grounds but the third. The third ground was "because his Honour charged the Jury that they had the privilege of judging from the newspapers and other evidence whether the Company knew that the voyage had commenced at the Havana."

On the third trial of this case, this ground (a breach of warranty) appears to have been abandoned. The Judge at least in his charge does not notice it, from which I conclude that he regarded the question as settled. Such is now the opinion of this Court.

The second ground presents two questions for consideration.

1st. Was the loading at the Havana under existing circumstances a fact material to the risk?

2nd. If so, was it necessary under the circumstances to communicate it to the underwriters?

I feel some embarrassment in coming to any conclusion on the first of the questions. When I tried this case on the Circuit, I thought, and so stated to the Jury, that it was a question for their consideration. I am now informed that it was a question of law, for the decision of the Court. It is a question of law as well as of fact; but I cannot perceive how the law and the fact are to be separated. I think one cannot be resolved without the other. It is certainly for the Jury to decide whether Havana was a belligerent port—whether the John was loaded there—whether the South American privateers were prowling about—whether Spanish subjects alone could ship goods from the Havana according to the laws of Spain—and whether these laws are not so habitually and constantly violated as to afford no pretext for stopping goods shipped from the Havana, as Spanish property, in opposition to all the other usual evidences of property, shewing them to be neutral. I am ready to admit that the Jury might set forth these facts in a special verdict, and leave the inference to the Court. But if they do not, how can the Court get at the facts from which an inference can be drawn? Put this case—Though the Havana was a belligerent port, the laws of Spain did not prohibit foreigners residing there from shipping goods, and that

the war, in fact, was confined to the land. Would the law infer a greater risk? The law here is reason, and as the Court is more expert in deducing correct conclusions from admitted premises, the finding of the facts belongs to the Jury, and unless they give them up, the Court cannot decide. The *casus fœderis* has not occurred, and the verdict of the Jury is conclusive, unless the Court can see that it is against evidence, or without evidence. Another difficulty here presents itself. How can we see that the Jury did not regard this fact as material, and that it was a question of law? The fair presumption is, that they did their duty, and regarded the fact as material.

This brings me to the second question. If the jury regarded the loading at the Havana material to the risk, or if this be the conclusion of the law from the facts adduced in evidence, was it necessary to state it in the offer, although the underwriters were acquainted with the fact? This I regard as the only question of law left open for our consideration. It has been said at the Bar, that even this question had been decided. But this is not the conclusion to which I have come. In the judgment delivered by this Court on the first appeal, the case was sent back on no other ground than that stated by the Judge, viz. that the Court were not satisfied that the Jury were authorised by the facts to conclude, that the insurers knew of the loading in the Havana. On the second appeal the Court say, "This is the second time this case has been before us. I shall (continues the Judge) express no opinion on any of the grounds but the third, on which a new trial must be granted. On this ground a new trial was formerly granted and there has been no new evidence given to vary the case." If I am not wrong as to the first opinion which is reported and in which I concurred, the case was sent back a second time on the same ground, and no other points have ever been decided, but;

1st. That there was no breach of warranty, and 2nd. That the Court thought the evidence from which the Jury inferred the fact that the defendants knew that the John had loaded at the Havana, was too slight to support the verdict. If this be so, I am at liberty to regard this question as open. [Is it necessary to communicate a fact to the underwriters which they already know? Facts are only required to be communicated to enable them to estimate the risk correctly. If this could be done without the communication, the reason of the rule would cease, and with it the rule itself. Hence an unimportant fact need not be communicated, nor a fact which he ought to know, and for the same reason a fact which he does know.— This reasoning is supported by Lord Mansfield, in the case of *Carter vs. Boehm*, 3 Burrows, 1910. His words are, "There are many matters as to which the insured may be innocently silent—he need not mention what the underwriter knows." Again, "An underwriter cannot insert that the policy is void, because the insured did not tell him what he already knew, what way soever he came to the knowledge."]

The questions of law are now disposed of. It remains to be decided how far this Court will interfere with the verdict on the ground that it is not sufficiently supported by the evidence. This Court will always order a new trial where the verdict is against evidence, but where the evidence is slight and unsatisfactory, they will only interfere so far as may be necessary to a fuller consideration by the Jury. They may have inadvertently done wrong, or may have been under the influence of some passing feeling which has biassed their judgments. In the present case, the evidence does not appear to the Court as strong as it ought to have been, but it is always difficult to understand evidence at second hand. Three verdicts have now been rendered for the plaintiff, not against law,

or without evidence or against evidence, but without sufficient evidence in the opinion of this Court. We can no longer on this ground interfere without danger of establishing a rule at variance with a fundamental maxim of our law, *Ad quæstionem legis respondent judices, ad quæstionem facti respondent Juratores*. The motion is therefore dismissed. *New trial refused.*

JOHN ROBINSON & Co. vs. CROWDER, CLOUGH & Co.

A prior commission of Bankruptcy in England, does not give the Assignees a lien over attaching creditors in this State.

No effect will be given in this State to the English Bankrupt Laws, nor to any provisionary assignment, made in aid of those laws.

All assignments by a creditor in England, within two months of the suing out of a Commission of Bankruptcy against him are void, and the Assignees hold in trust for the Assignees under the Commission.

As between the Bankrupt and the Assignees under the Bankruptcy, the Commission transfers all the rights the Bankrupt has, whether in England or in a foreign country.

The Assignees, however, as to foreign debts, stand in no better situation than the Bankrupt himself, and are subject to every equity, and to the remedies provided by the laws of the foreign State, and when they are permitted to sue there, it is not as Assignees, but as representatives of the Bankrupt.

An assignment in England, within two months of Bankruptcy, is an assignment in aid of the Bankrupt Laws, and will not give a lien prior to a subsequent attachment in this State, over rights attached here.

An assignment made by one partner of the effects of the firm, for the payment of their debts, though under seal, will bind the other partner.

Where a seal is not essential to the validity of a contract, the addition of a seal will not vitiate it.

The plaintiffs, on the 19th September, 1825, sued out a writ of attachment against the defendants, merchants, upon which their property in South Carolina was seized. Thomas Case came in and suggested that the property attached did not belong to the defendants, but to him, the claimant. The Court, in pursuance of the attachment

act, directed the plaintiffs to declare. An issue was taken on the point, whether the goods, &c. attached were, at the time of their seizure, the proper goods of Thomas Case. The Jury found the following special verdict :

“We find that Thomas Crowder, and Henry Thomas Perfect, of Liverpool, in England, merchants residing there, and carrying on business there in partnership with James Clough, of Charleston, South Carolina, all British subjects, under the firm of Crowder, Clough & Co. did, on the 20th August, 1825, execute an assignment under their hands and seals, to Thomas Case, at Liverpool, of all and singular the debts, estates and effects of the said Crowder, Clough & Co. within the United States, in trust for the benefit of all the creditors of the said Crowder, Clough & Co. rateably and in proportion to their several debts, and that the said assignment was recorded in the Secretary's office of this State on the 5th October, 1825, which said assignment is hereby referred to as a part of this verdict, and marked D.; and that the said Thomas Case did, on the 20th August aforesaid, appoint W. Lance his attorney within the United States. We find, also, that the said Thomas Crowder and Henry Thomas Perfect, committed an act of Bankruptcy, by stopping payment and closing up their house of business at Liverpool, aforesaid, on the 8th August, 1825, and that a commission of Bankruptcy issued against the said Thomas Crowder and Henry Thomas Perfect, some short time after the date of said assignment to Thomas Case. We also find, that on the 19th day of September, in the same year, John Robinson & Co. of Charleston, and other persons claiming to be creditors of the said Crowder, Clough & Co. sued out writs of attachment in this State against the said Crowder, Clough & Co. (the said John B. Clough being also at that time out of the State,) by virtue of which writs the debts and other effects of the said Crow-

der, Clough & Co. attached in the hands of the garnishees, and so alleged to be assigned to the said Thomas Case, are claimed by the said attaching creditors as subject to the debts they may prove against the said firm in exclusion of the said assignment. We also find, that James B. Clough, of the said firm of Crowder, Clough & Co. was in the United States during the whole year 1825, and that a commission of Bankruptcy, issued against the said James B. Clough, in England, on the 10th June, 1826.—But whether or not upon the whole matter aforesaid, in form aforesaid found, the said assignment to the said Thomas Case, vests in him the debts and effects of the said Crowder, Clough & Co. in preference to the said John Robinson & Co. and the other attaching creditors claiming under their said writs of attachment the Jurors aforesaid, are entirely ignorant and pray the advice of the Court, and if upon the whole matter so aforesaid found, it shall seem to the Court that the said assignment transferred to the said Thomas Case, all the debts and effects of the said Crowder, Clough & Co. in this State, and that the said attachments do not operate as a prior lien on the debts and effects so alleged to be assigned, then we find for the plaintiffs; but if upon the whole matter it shall seem to the Court that the writs of attachment take a preference over the said previous assignment, then we find for the defendants.”

His Honour, Mr. Justice RICHARDSON, upon this verdict ordered judgment to be entered for the claimant, Thomas Case, and the attachments to be discharged.

From this order the plaintiffs appealed, and moved to set the same aside, and to have the property seized adjudged to be the proper goods, chattels, monies, &c. of the defendants, and liable in the hands of the garnishees to the plaintiff's demands.

King, for the motion. One of the partners was in the United States—he remained here in 1825–1826. The commission of Bankruptcy was taken out in 1826, at London. Previous to the Bankruptcy the assignment was made in America. The effect of Bankruptcy, of two out of three, was to give to the solvent member the controul of the funds in his possession in America. *Fox vs. Hanbury*, 2 Cowper Rep. 445; *Smith vs. Stokes*, 1 East. 363.

James Bulter Clough, until he had committed an act of Bankruptcy, had full command over the funds in his possession. *Britwood vs. Miller*, 3 Merivale 279, 282.

The Bankrupt Laws of England only extend to the territory of England. The act of Bankruptcy in England of 1825, could not then effect in any way the property of the copartnership in America. It was well to consider the power of a co-partner in this country, where the principal domicile is in America. It was not a great deal to say, that the act of Bankruptcy in England could not deprive him, without his consent, of his controul here. So long as he has not committed an act of Bankruptcy it will be beyond the power of his partners in England to deprive him of his legal controul over the property in his possession. *Harrison & Sterrey*, 5 Cranch, 289, 300.—Such a rule would deprive the partner of paying the debts which he had contracted here. The Bankruptcy dissolved the co-partnership. *Montagu on Co-partnership*, 118. The act of Bankruptcy is legally a fraud upon the solvent-partner. It would be strange to suffer this act of the law in England to deprive the American creditor of the funds to which he gave credit in this country. The commission of Bankruptcy has relation back to the first act of Bankruptcy, no matter how secret, and it vitiates all intermediate transactions, and therefore the assignment to Case made in Liverpool, was void by the

law of England. A voluntary assignment by the laws of England ipso facto void, may be made for the payment of debts. Kennedy's Bankrupt Law 99—Appendix B. *Ex parte Blake*, 1 Coxe, 198. Thomas Case then asks the Courts of this country to give effect to a deed void by the *lex loci*, where made, and thereby to supercede the rights of the American creditors. Could it be pretended that any such view could be sustained in England under this assignment? The case had been fully discussed in N. York, in the case of *Holmes vs. Ranselm*, 4 John. C. R. 489, and Chancellor Kent, after a full consideration of the cases, determined that he would give effect to a foreign assignment under their Bankrupt Laws—that the commission of Bankruptcy was the law of nations and would be carried into effect by all nations; a decision since overruled and directly opposed to all the English cases; for even in the English Courts it has been determined, that Bankruptcy does not transfer property of the Bankrupt in a foreign country. The opinion of Ch. Kent was not founded on the private assignment in that case, but entirely upon the commission and assignment under it. In the same case, in 20 John. 267, Mr. Justice Pratt said, that the Bankrupt partner was as if he was dead.

A deed by two of several partners does not bind those who do not sign it.—It is a mere nugatory act as to the others. 1 Montagu Partnership, 42, 43. To bind the partners by an assignment of all the effects under hand and seal, or for any other purposes than within the objects of their trade, the whole of the partners must join. The Bankrupt Laws of England do not extend to the colonies; nor does it comprehend the King, he not being mentioned. Kennedy's Bankrupt Law, 95. It has repeatedly been decided, that a foreign discharge under a foreign Bankrupt Law, is no discharge in England. They do not notice foreign Bankrupt Laws at all. *Smith vs. Buth-*

annan, 1 East 6 ; 20 John. 260. It is but just that there should exist a proper reciprocity.—They do not regard our Bankrupt Laws, and therefore it would be unreasonable that theirs should be enforced here. But it was clear that the Bankrupt Law of England was merely a territorial law. The Bankrupt Law of England was never in force in the United States, nor had any effect here, notwithstanding what Lord Thurlow has said. 5 Cranch ; M'Millan vs. M'Neal, 4 Wheaton, 212 ; Topham vs. Chapman, 1 Constitutional Rep. 283. The only exception to this rule was the opinion of Chancellor Kent in Holmes vs. Ranselm. In Ogden vs. Saunders, 12 Wheaton, 364, the opinion of a majority of the Supreme Court of the United States coincides with Topham vs. Chapman, and denies the operation of the English Bankrupt Laws in the United States.

Petigru, same side. Topham vs. Chapman had settled the law as to the operation of the Bankrupt Laws of a foreign country. In one clause of the Bankrupt Act a provisional assignment is provided for. Kennedy's Bankrupt Laws —, and such assignee is bound to re-assign to the assignee under the commission ; and all transfers since the first act of Bankruptcy are void. In Holmes vs. Ranselm, neither Ch. Kent nor Justice Pratt looked upon the appointment of a provisional assignee as any thing. It was only to give further effect to the commission of Bankruptcy ; and so it is considered in Dutton vs. Morrison, 17 Ves. 193. If Crowder & Clough had refused to make this provisional assignment in England they would have been coerced by the Courts there, and therefore such assignment could have no other operation than the general assignment under the commission. But upon broader principles it was clear that the assignment in England could have no effect here. In Fox vs. Hanbury, 2 Cowp. 445 ; 11 Ves. l., *Exparte Williams* ; *Crawshay vs. Col-*

lius, 15 Ves. 218; *Crawshay vs. Mall*, 1 Swanston, 506, it is said that the Bankruptcy operates as death, and dissolves the co-partnership; and the question was, by what mode of reasoning the partners in England could divest Clough of the effects of his possession in America.—After the dissolution, it is a familiar principle that one partner can do nothing to bind the others. *Rigson vs. Pillen*, 1 Starkie, 375; *Kilgore vs. Finleson*, 1 H. Black. 155; 1 M'Cord, 16. A partner can only claim his share on settlement of accounts, and his assignee cannot be placed in a better situation. The assignee of one partner under Bankruptcy, can only be a tenant in common of an undivided moiety, subject to all the rights of the other partner. Suppose then that we could notice the Bankrupt Laws of England, Crowder & Perfect in England, or their assignees could only be considered as tenants in common with Clough in America. The adversaries must make out that Crowder & Perfect could, after the dissolution, being only tenants in America with Clough, have perfect controul over the whole of the funds, and perform acts not within the scope of the co-partnership. In *Bolton vs. Chatzel*, this Court has decided that the effects of one partner could be attached, and the whole of the money ordered to be paid over. By this authority the American assignment must carry the whole effects assigned. But another objection to the assignment to Case was, that the assignment was of effects in America by two partners in England, the effects being in the possession of a third partner in America.—This surely was not within the scope of their business. From the very constitution of their partnership, the funds in America were within the controul of Clough, and the effects in England under the controul of the English partners. Only conceive of John Robinson's appearing in the King's Bench and claiming the property there under an

assignment made by Clough. The Attachment Law here is as much to be respected as the English Bankrupt Law. He held it would be utterly ridiculous if Mr. John Robinson were to attempt any such thing. Suppose he had gone even before the Bankruptcy of Crowder and Perfect? The Courts would there have regarded it as a nullity; for it would there be ipso facto an act of Bankruptcy and void. *Dickerson vs. Legare*, 1 *Dé Saussure*, 537, was a direct authority in point, decided by Chancellors Mathews and Rutledge. One partner there executed an assignment while in England of all of the co-partnership effects.—The Court said to sanction such conduct, would be to cut up commercial transactions by the root, by putting it in the power of any partner to ruin the others in a moment. Pending the partnership, each has a right to dispose of the stock in the ordinary way of commercial business, and after the dissolution to settle the affairs in the ordinary way.

Gow on Partnership, 283, (312 of the American Edition.) After the dissolution, the partnership still exists so far as to winding up the affairs in the ordinary way; as to other matters they are mere tenants in common, and have no right to exclude each other from participating in the settlement of the affairs. But if an English partner, by an act of this kind, can sweep away the funds from an American partner, how can it be said that he is not excluded from the possession of the effects and participation in the settlement of the affairs? How could he or his creditors in America interfere in England? It is no easy matter to prove a case in England. But even there the assets in America would be applied by one rule, and the assets in England by the rule in England, and the rule as to the domicile would govern, and therefore as far as creditors are concerned it is a matter of great importance where this distribution is to take place. In the case of

Le Chevalier, Douglass 170, Lord Mansfield held, that Lynch a plantation man from St. Christophers dying, his effects were subject to the laws of that island, and they were distributed accordingly. Suppose the assignment here had been made under the Bankrupt Laws of this country, would not such assignee effectually hold the fund? And if Lord Thurlow had considered what Lord Mansfield had held, he would not have expressed his surprise that the Bankrupt Law of England had been respected in America. Gow 83, Harrison vs. Jackson, 7. T. R. 203. In Dutton vs. Morrison, there was a deed by two partners, and no one in that case ever considered it as conveying any interest of the partner who did not execute it. The only case upon which the opposite side could rely was that of Harrison vs. Sterrey, which he conceived in his favor. It came within the rule of those cases where the rule of the domicile governed. This case was just the reverse. J. B. Clough was authorized there to raise money on the funds in America under his controul, though two of the partners were absent in England, he being considered their agent for that purpose in America. Crowder & Perfect were under bonds, and under the control of a messenger when they executed their assignment, and he believed any man would rather be a prisoner of war for a whole year, than be a Bankrupt in prison for one month. The act of Clough, in America, was within the very scope of his agency. The case agrees precisely with the case of Dickerson and Legare, and not with Sterrey and Harrison.

Hunt, in reply. Many important parts of the case had been passed by. This was a question between the attaching creditors of the firm of Crowder, Clough & Co. and the assignees of the firm, under an assignment made by two of the partners, before Bankruptcy, resident in England.—An act which they were fully authorized to

do. He admitted the rule, that Bankruptcy does not effect property beyond the realm; and therefore it would not effect the English assignment of the property in question. Bankruptcy is in invitum—it is not voluntary. It is coerced, and therefore its operation can only extend to the territory. And though the commission acts as if executed at the time of the first act of Bankrupt, yet it would create the assignee of any intermediate assignment a trustee for the commissioners of Bankruptcy. But as it cannot operate beyond the territory, as an act under the statute, yet it is good as a deed at Common Law.—The deed is only void as far as in conflict with the Bankrupt Law, and therefore good as a foreign effect, and it was only necessary on his part to cite *Harrison vs. Sterry*. In point of fact neither of the partners were in South Carolina, or the attachment would not have issued. They were all absent then, and the question was between the attaching creditors and the assignees of two; and in *Harrison vs. Sterry*, the assignment of one was held sufficient. The simple question was, whether the effects were in the assignees, or in Crowder, Clough & Co. at the time they were attached. Clough, it is said, was in the United States; but he might as well have been in India so he was not in Carolina. He apprehended the law was, that after dissolution no new contract could be made—no new liability could be created by one partner. It was only where one co-partner complained that such exception could be made to the acts of a co-partner. But here Clough had consented to the act, and third persons cannot interfere or complain.

As to the seal.—He thought that putting a seal to a contract could not avoid that which was good without seal. The assignment at Liverpool was made as a transfer subsequently agreed to by the other partner for the payment of the co-partnership debts, which was nothing

more than their duty, at the time, and within the scope of their duties and authorities. Independent of the Bankrupt Laws of England, an assignment to John Robinson would have been perfectly good in England, if the rights under their Bankrupt Laws had not previously vested.—So the attachments here wont take, if they were prior to the assignment in England.

As to the argument that the Bankruptcy dissolved the co-partnership, it was only necessary to say that it only did so as to the funds it operated upon, and not upon the funds or firm in America. Case received his assignment some time before the attachment and had appointed Mr. Lance as his attorney here, to take possession of the funds so assigned, which divested all interest of Crowder, Clough & Co. The assignment was in favour of all the creditors rateably and proportionably in England and America. The Bankrupt Law, cited from Kennedy, was passed since these transactions, and of course they were to be governed by the previous state of the law.

Lance, same side. A previous voluntary assignment takes priority of an attachment—8 Wheaton, 168, 288; *Holmes vs. Ranselm*, 4 John. C. C. 489; 6 Binney; 1 Bay, 88. The act by a majority of the partners, is binding on the minority—*Kirk vs. Hudson*, 3 John. E. R. 405–6. A co-partnership is there considered as a little community, the majority of whom must govern, as in other communities. It has been decided that an assignment by one partner is good against the others. 5 Com. Dig. 88, (assignment, title merchant); *Mills & Stuart vs. Barbour*, 4 Day, 428. In this last case, a deed which a partner cannot make is defined to be a deed which at Common Law would not be efficacious without a seal. But the law of this State does not require that an assignment should be under seal. It has been decided here, that the assignment of a bond need not be under seal.

of their rights. Under the Bankrupt Laws, the Bankrupt may be discharged by the consent of a certain proportion of their creditors in number or value, and will they ever give that consent without such assignment?

In *Holmes vs. Ranselm*, the fact did not appear that the assignment was made in fraud of the law. But it is impossible in this case to draw any other conclusion from the facts in this case, than that the assignment was either in aid of the Bankrupt Laws, or in fraud of our laws by withdrawing the funds. The property is divested from the act of Bankruptcy, 1 Ken. 120.

This rule is modified by the 78th section of the Bankrupt Laws, which provides that all transfers, &c. that are made within two months before issuing commission, are good unless the party had notice of the act of Bankruptcy. The necessary inference is, that all transfers made in that time are void. In 2 Huber, b. 1, Tit. 11, it is said, contracts made in one country, have their effect elsewhere, according to the laws of that country, except when it is to the prejudice of the citizens of that country. The theory of the law is that, as to personal chattels they attend the person, and may be supposed to be actually transferred. Here is a contract executed in England by subjects of that country, and it can take effect only according to the laws of that country; and according to the rule the operations of those laws shall not work a prejudice to our own citizens.

This assignment contain trusts, and by the Laws of England the King is entitled to a precedence, and under their operation the trust would be wholly defeated. So if the assignee carried the fund into England, it would be subject to the operation of the Bankrupt Law. It follows that the *lex loci* will in general be operative here, and we should be compelled to carry them into effect in every case, so far as the partners are concerned, but there is a

saving in favour of our own citizens. Whether the legal estate remained in the Bankrupts after the act of Bankruptcy, or not, is immaterial, if in the Bankrupt it was the subject of attachment.

The act of Bankruptcy is a dissolution of the firm, and therefore the act of one or more could not bind the firm. It does not follow that all the partners were Bankrupts. Now admitting that in general they might do so non constat, that he could do any act by which his rights could be altered or changed.

It is clear then that the assignment is void, because it was made in aid of the Bankrupt law. It is void, because by the act of Bankruptcy the right vested in the assignees of the commissioners. It is void, because two partners were not competent to make it so as to bind the other; and because it is under seal.

Watson on Part. 91.—Each partner has an absolute right to dispose of the whole stock in the way of trade. But it is denied that this power extends so far as to enable one or more of a firm to put an end to the concern, and such would be the effect of this assignment.

4 Ves. 399.—The individual is lost in the firm, and when they act individually they stand in the relation of agent to the firm, and no one will contend that an agent can put an end to the concern, or change the nature of the business.

The case of *Harris vs. Sterry* differs from this. There the assignment was of a part of the funds only. It is expressed to have been for the purpose of enabling the firm to go on with their business, and to save their credit.—*Fox vs. Hanbury*, Cooper 445, 17 Ves. 193, 205; 4 Ves. 396.—This deed or assignment does not in its effect convey any thing; the trust is for the benefit of the firm. The rights of the trustee are merely legal.

CURIA per JOHNSON, J. The facts ascertained by the special verdict, stated in their chronological order, are concisely these. The defendants, Thos. Crowder, Henry Thomas Perfect and Jas. B. Clough, all British subjects were partners in trade. The two former, Crowder and Perfect, resided in Liverpool, England, and the latter, Clough, in Charleston, South Carolina, and carried on business at these places respectively, under the firm of Crowder, Clough & Company. On the 8th Aug. 1825, the House in Liverpool committed an act of Bankruptcy and on the 20th day of the same month, Crowder and Perfect executed an assignment in the name of Crowder, Clough & Co. under their hands and seals, to Thos. Case, of all and singular the debts, estates and effects of the said Crowder, Clough & Co. within the United States in trust for all the creditors of Crowder, Clough & Co. rateably, and shortly after a Commission of Bankruptcy issued in England against the said Thos. Crowder, and Henry Thos. Perfect. On the 19th Sept. of the same year, and shortly after these proceedings were had, the plaintiffs and others claiming to be creditors of the said Crowder, Clough & Co. and residing here, sued out writs of attachment, which were levied on their effects, estates and credits which were found here. At this time Jas. B. Clough had left this State, but was still in the United States, and on his going to Liverpool afterwards, a Commission of Bankruptcy issued against him also there on the 10th June, 1826. On the return of the attachments, Thomas Case, through his attorney in fact, interposed his claim to the effects so attached, and the question now submitted, is, whether he is entitled to them under the deed of assignment so made. If he is, it follows that the plaintiffs take nothing by their attachment; if not, then of course this motion must prevail.

This as a question of international law, is in itself, highly interesting, but is rendered more so by the zeal and ability which it has elicited from the counsel on both sides, and the learning which has been put in requisition. By recurring to the facts stated, it will be seen that the Commission of Bankruptcy against Crowder and Perfect was prior in point of time to the plaintiffs attachment, and the question has been raised, but not with much confidence, that the proceedings in bankruptcy operated as a transfer to the Commissioners of all the property which belonged to Crowder, Clough & Co. wheresoever it might be found to the exclusion of the subsequent attaching creditors. But the case of *Topham vs. Chapman*, 1 Const. Rep. 229, is decisive of that question. In that case, the question arose directly between the assignees of a bankrupt in England, and attaching creditors here, and although the attachments were issued subsequently to the suing out of the commission of bankruptcy, the Court held that it did not create such a lien on the property here as gave it the preference over the liens created by the attachments of the attaching creditors, and that judgment is, I think, very fully sustained both by principle and authority.

A question of more difficulty arises out of the claim set up in behalf of Case, founded on the deed of assignment, of the 20th Aug. 1825, also prior to the plaintiffs attachments, by which Crowder and Perfect, in the name of Crowder, Clough & Co. have assigned to him all their property in the United States.

Independently of the interest which creditors residing here may have in the property assigned, there is no question that as between the parties the assignment would be binding here as well as in England, and supposing it to have been voluntary and binding according to the laws of that country, and not inconsistent with our laws, the

Courts here would upon the well settled principles of universal law be bound to give it effect and operation.

But it is objected for the plaintiffs—

1st. That this assignment being by deed and made by two of the partners only, is not binding on the third and is therefore void.

2nd. That the assignment was either in aid of the Bankrupt Laws of England, and calculated to give them an effect here inconsistent with the laws of this country, and therefore void; or that the rights of Crowder and Perfect in the property assigned, vested in the Commissioners in virtue of the proceedings in Bankruptcy, and the assignment was therefore nugatory and inoperative.

As to the first, the books furnish numerous dicta which sustain the position that partners cannot bind each other or the firm of which they constitute a part, only by deed, but on examination of the cases, it will be found that they relate to transactions that are purely mercantile, and that they depend on the principle that a partner can do no act which will be binding on his firm, which is inconsistent with or foreign to the object of their association. *Amir*

Simple contracts, such as promissory notes, bills of exchange, open accounts, and others of like nature, are according to usage regarded as mercantile contracts, and the co-partnership is entered into with reference to the powers of each partner to bind his firm in this mode, and for that reason it would seem one partner cannot bind his firm in a penal bond, (Bacon Abr. Merchant, C.) nor can he transfer the real estate of the firm used for the purposes of carrying on business by deed, because it might in effect, defeat the object of partnership. (Ibid.) If, however, the buying and selling of lands and other real estates which can only be transferred by deed, was the

object of the co-partnership, no one will doubt but that a partner might bind his firm by such an instrument.

I apprehend too, that where a seal will not change or vary the liability and is not essential to the nature of the contract, that then also the addition of a seal will not vitiate it; as in the case of a release, in which the authorities all agree that it is good, notwithstanding the addition of a seal; (Com. Dig. tit. Merchant, D. Days Ed. note H, sec. 151, where the cases on this subject are collected,) and they proceed on the principle that the release independently of the seal contains intrinsic evidence of the payment of the debt, and is therefore good against the firm.

Again, let us suppose that at the foot of a bill of parcels a partner had acknowledged in the name of the firm and under seal, that in consideration of a sum specified he had sold and delivered to his customer the goods therein contained, would it be doubted that such a memorandum would be a good bar to an action brought by the firm for the goods themselves or their value? I think not.— And it appears to me very clearly, that if Crowder and Perfect were in other respects competent to make the assignment in question, it is not vitiated by the presence of a seal. In the case of *Harrison vs. Sterry*, 5 Cranch, 300, it was held, and I think on very sound principles, that an assignment of funds for the payment of debts, was in the course of trade. Indeed every partial application of funds to the payment of debts, whether it consists of cash, or goods, or any thing else, is in effect an assignment for that purpose and binds the firm. And if in the course of things, a general assignment becomes necessary, there can be no reason why it should not be equally binding. The principle is the same whether it be partial or total, and it follows that in either case *one* may bind the whole.

It is said, however, that the assignment was not obligatory on Jas. B. Clough, the partner resident here, and I concede that as between themselves, Crowder and Perfect had no control over the interests of Clough, and that their assignees could only take their interest in common with Clough, but this was an appropriation of the whole funds of the concern to the payment of all their debts, and whether he had any interest or not must depend on a surplus remaining after the payment of the debts. The whole was applicable to that object, and if the whole was necessary, he was bound to that extent.

The remaining questions which I deem it necessary to notice, arise out of the second objection above stated. It is that the assignment was in aid of the Bankrupt Laws of England, and calculated to give them an effect here, inconsistent with the laws of this country, and therefore void; or that the rights of Crowder and Perfect in the property assigned by virtue of the proceedings in Bankruptcy were vested in the Commissioners and by relation back to the act of Bankruptcy, and the assignment was, therefore, nugatory and inoperative. It has been before shewn that in the conflicting operations of the English Bankrupt Laws and our Attachment Laws unaided by extrinsic circumstances, the latter would take the precedence of the former as between the assignee of the Bankrupt and the attaching creditors, and it follows as a necessary consequence that if this assignment was a constituent part of the proceedings in Bankruptcy and was in aid of the Bankrupt Laws, that it cannot have an effect of itself either inconsistent with or to an extent beyond the law itself. Now there are many circumstances connected with this assignment, which favor the conclusion that it was intended to aid the operation of those laws. It was made after a notorious act of Bankruptcy, and is in its terms merely provisional, evidently with an

age to the consequences which followed. Being an assignment for the benefit of all creditors rateably, it was in itself an act of Bankruptcy; and by the laws of England such an assignee is held to be a trustee for the assignees under the Commission of Bankruptcy.

The terms of the English Bankrupt Laws which entitle the Bankrupt to his discharge, is a general and unqualified surrender of all his property, and unquestionably extends as between himself and the assignees to property in a foreign country; and if assignments executed under circumstances like these are to have the effect and operation contended for on the part of Case, they would soon grow into common use and thus give an effect to those laws which are denied to them by the well settled principles of international law.

The alternative contained in the objection above stated, is, I think, equally conclusive against the claims of Mr. Case. There is no doubt that under the former statutes of Bankruptcy, the assignment by the Commissioners vested in the assignee all the property of which the Bankrupt was possessed, and that too in relation back to the act of Bankruptcy, by avoiding all intermediate transfers, (Com. Dig. Tit. Bankrupt D. 26,) and the recent act under which these proceedings are said to be the first that were had, makes no change which can affect the question under consideration. By the 78th section, all transfers of property, &c. made more than two months before suing out of the Commission and without notice of the act of Bankruptcy are declared to be valid, leaving the law with respect to those made within that period as it stood before, and by necessary implication avoiding all made within that period, (Kennedy's Bankrupt Law.) The act of Bankruptcy in this case was committed on the 8th August, 1825, and although the special verdict does not ascertain the day on which the Commission was is-

sued, it was prior to the suing out of the attachments on the 29th September following, and the assignment having been made between these periods, was necessarily within two months of the suing out of the Commission and was therefore void, unless it was to be regarded as in aid of the Bankrupt Laws, the consequences of which, have been before noticed. Notwithstanding the difficulty in which the question has been involved and the apparently conflicting opinions which have been entertained in relation to it, I think I may venture safely to lay it down as well settled law, that the proceedings under the Bankrupt Laws of England transfer to the assignees all the interest which the Bankrupt had in the property assigned whether it was found in England or in this or any other foreign country. In support of this position it might perhaps be sufficient to rely only on the case of *Topham vs. Chapman* before referred to, in which upon a review of most of the cases it is conceded to the extent necessary for the purposes of this case and in which my brother Nott, who delivered the opinion of the Court comes to the conclusion that by the assignment, all the goods of the Bankrupt *ubicunque fuerint* vest immediately in the assignees. I will add to this, however, another case of more recent occurrence, and which has also a strong bearing on a branch of this case before noticed. In *Holmes vs. Remsen*, 20 Johnson, 239, Mr. Justice Platt after a very laborious and learned investigation of the doctrine and all the cases on the subject, reasons himself to the same conclusion. He observes "that the true principle is that the assignees of a Bankrupt are on the same and no better footing than the Bankrupt himself in regard to foreign debts. They take subject to every Equity and subject to the remedies provided by the Laws of the foreign country where the debts are due, and when permitted to sue in foreign countries it is not as assignees

having an interest, but as representatives of the Bankrupt." In the case of *Hunter vs. Potts*, 4 Term. Rep. 182, the doctrine was carried so far, that a creditor residing in England, who had attached the money of a Bankrupt abroad was in an action brought against him on his return to England, held to be liable to the assignees as for money had and received to their use.

The deductions from these views necessarily lead to the conclusion that regarding the assignment as in aid of the Bankrupt Laws of England, it can have no effect beyond the law itself, and that under the proceedings in Bankruptcy the legal right in the property vested in the assignees as between them and Crowder, Clough & Co. by relation back to the act of Bankruptcy; so that in any view of the matter Case took nothing under the assignment, and led the Court to the adoption of the order made in the cause at the last term. The motion is granted and leave given to the plaintiff to enter up judgment on the special verdict.

Judgment reversed.

**C. PATRICK and C. J. MANNIGAULT vs. COMMISSIONERS OF
CROSS ROADS ON CHARLESTON NECK.**

The Legislature may order a Street to be opened over the Lands of an individual without making compensation.

In December, 1825, the legislature authorized America street, in Hampstead, to be extended through the lands of C. Patrick, and the estate of G. Mannigault, until it intersected with Judith-street. The Commissioners were about to break down the fence of the relator, C. Patrick, and to extend the street according to the terms of the act. An application for prohibition was made, on the ground, that the legislature had no authority to appropriate private property for public purposes, without ade-

quate compensation. The prohibition was refused by BAY, J. and this was an appeal from his decision.

Dunkin, for the appeal.

Petigru, attorney-general, contra.

CURIA *per* HUGER, J. (sitting for JOHNSON, J. who was sick.) Had this question never been made before, I should feel much difficulty in forming, and should hesitate long before I expressed any opinion on the subject. The power of taking private property for public uses, without making compensation, is so much at variance with the established principles of this Court, that nothing but the most urgent necessity, or universal acquiescence could have reconciled me to its existence. Had this power been seldom or never used, I should have anticipated from its exercise the greatest evils, but experience is a soother of apprehensions. Ever since the existence of our government—of all governments, this power has been in constant use; and perhaps we have experienced as few evils from the exercise of it, as from any other in the whole catalogue of sovereign attributes. This, like every other power, will be occasionally abused; and the only remedy for this, and many other evils, is to be found in the good sense and virtue of the people.* It would be enough, in any other country than our own, to rest its legitimacy upon its antiquity; but here we have imbibed too much of the metaphysics of the revolution, to be satisfied with any thing, because it *has* been. We must know why it should be.

It is true that the elementary articles, as well as the people, in the Constitution of the United States, have said that private property ought not to be taken for public purposes unless compensation be made; and so say we all, and so have said the legislature on many occasions, and I have no doubt will so act whenever a proper occasion is presented. But this is not a limitation of the pow-

er—it is only the moral obligation by which the legislature is bound, to use this power discreetly and justly. But this obligation is imperfect, and cannot be enforced by this or any other Court. If the words in the Constitutions of the United States and Massachusetts, are to be taken as a limitation of the power, and not a recognition of the moral obligations not to abuse it, it is very clear they cannot be construed into a grant of the power, but a limitation upon a power already possessed. The words are—"nor shall private property be taken for public use, without just compensation." In no part of the Constitution is this power expressly given. This, then, is a limitation on an implied existing power.

In most of the State Constitutions this power is recognized, and in many limited, as in that of New Hampshire. "But no part of ~~man's~~ property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people." There are no words in our Constitution limiting or granting this power. Does it not therefore exist? From the continued use of the power—from the constitutional construction of the Constitution of the United States—from the almost universal recognition of it, by all the States, as well as from the necessity of such a power, I must conclude that it exists in our legislature also.

But it is contended that this power is not only not given in the Constitution, but is expressly negatived in the 2nd Section of the 9th Article—"No free-man shall be deprived of his life, liberty, or property, but by the judgment of his Peers or by the law of the land." An act of the legislature of yesterday, it is said, is not a "law of the land," within the meaning of this clause. What is meant in the Constitution by "law of the land," has never been well explained. Learned commentators and learned Judges, have differed in their

definitions of this term. I shall not attempt to recount them: it is enough to decide in this case, that the act in question is the law of the land, as much so, as a militia act, or road act, or any other act, which the legislature of the country has always been in the habit of passing. Acts like the one in question have been passed, not only ever since the adoption of the Constitution, but ever since the first establishment of provincial legislatures in this country, and indeed by the parliament of Great Britain, as far back as the memory of man reaches. What has been so long existing is under any of the definitions a law of the land. The legislature then was authorized by the law of the land, to pass this act, and consequently the relators have not been deprived of their property, without the law of the land. The motion is refused.

WM. S. PRICE VS. ROBERT LIMEHOUSE. •

Where a tenant had leased premises for six years, and gave his bond for the payment of the rent in gross, it was held that the landlord might, notwithstanding, distrain for the rent, the bond not having been paid.

It is not necessary to support a distress that rent should be reserved *eo nomine*, if it appear really to be due.

• •

This was an action of Replevin brought by Wm. S. Price against Robert Limehouse. The defendant was owner of a house and lot in King-street, Charleston, which, on the 1st September, 1821, he leased to the plaintiff for six years and a half, commencing from that date. In consideration of the lease, the plaintiff agreed to pay to the defendant the sum of \$804 in cash, and to execute a bond in the penal sum of \$2113, conditioned to pay \$1056 50 cts. in two equal instalments, the first payable on the 13th April, 1823, and the second, in two years from that date, with interest on the whole sum, payable annually, from

18th April, 1821. The plaintiff having complied with this agreement, by paying the cash part and executing the bond for the remainder, continued in peaceable possession of the premises, under the lease, from the date thereof, until on or about the 5th of August, 1824, when the defendant issued a distress warrant and levied upon certain articles of furniture belonging to the plaintiff, for the sum of \$711, being part of the bond remaining unpaid as alleged. The plaintiff replevied.—The defendant pleaded the common avowry and cognizance for rent; to which the plaintiff replied in bar (craving oyer of the said demise and setting it forth in the plea) that he had executed the bond required by the demise, and that the defendant had no remedy by distress for default of payment, but should have resorted to his action upon the bond. To this plea the defendant demurred generally, and the plaintiff having joined in demurrer the case came on to be argued before his honour, Judge RICHARDSON, who sustained the demurrer.—Whereupon the defendant took a verdict for the amount of principal and interest due on the bond.

A Motion was now made to set aside the verdict, and to reverse the decision upon the demurrer.

Motse, for the motion. The defendant, by taking a bond for the rent of the premises relinquished, *ipso facto*, his right to the remedy by distress, and must seek redress in the usual form by action on the bond. There was no rent reversed in the demise which is necessary to the support of the remedy by distress.—1 Bay, 315; *Ib.* 443; 2 Const. R. Tread. Ed. 637. Even if there were such reservation of rent in the demise, it extended to the whole term for which the lease stipulated to run, to wit, for six and a half years, and therefore any distress prior to the expiration of the term was premature and illegal. To entitle the defendant to distrain, the rent, if it could be claimed as such, should have been payable annually—Co.

Lit. 144. This distress was for interest on the bond also, which was illegal—6 Johnson, 43. The bond was a common money bond, and if any distress could have been made to enforce its payment, it should have been made for the penalty, and not for any of the instalments.

Henry Grimke, contra. The leading question is, whether rent has been reserved. If it has been, the right to distrain follows of course. The parties by their contract may fix the time whenever they please, that the rent should become due—2 D. & E. 600; Gilbert on Distress, 32. Taking a bond or note will not extinguish the right to distrain—3 M'Cord, 484.

T. S. Grimke, same side, cited Brady on Distress, 102; 2 Bin. 146; Van Leon vs. Smith.

H. A. De Saussure, in reply, cited Parker vs. Harris, 1 Salk. 262.

CURIA per NOTT, J. The Court concur in opinion with the Judge below.

I will avail myself of this opportunity to correct an expression which I made use of in the case of Marshall & Giles—2 Const. R. Tread. Ed. 637—that a distress will not be allowed except where “rent is reserved eo nomine.” It is not necessary that it should be reserved by the *name of rent*.—It is sufficient if it shall appear to be for the use and occupation of lands or houses, though not denominated *rent*. The motion is therefore refused.

Judgment affirmed.

SOMERALL VS. GIBBES.

An action on the case lies against a Master or Commissioner in Chancery for neglecting to take good security on a guardianship bond.

But the amount due by the guardian must be ascertained by a decree of the Court of Chancery, before suit can be brought against the Master; as otherwise the amount of damage cannot be ascertained.

This was a special action on the case against defendant, late Master in Chancery for the District of Charleston, for taking an insolvent person as surety on a guardianship bond of one Rhodes, who was appointed guardian to the plaintiff by the Court of Chancery, and the defendant was ordered to take the security.

The case was tried before the Recorder of Charleston, before whom a nonsuit was moved for, on the ground that by the act of 1791, the Master was bound to give bond for the faithful performance of his duties, which the plaintiff should have sued on. And that the plaintiff should have obtained a decree against the guardian on a bill to account before the amount of damages could be ascertained; and until he did so, he could not bring this suit against the Master.

THE RECORDER refused the motion, and the jury found a verdict for the plaintiff.

The defendant now moved for a new trial, on the ground that the act was a judicial and not a ministerial one, for which the officer was not liable, and that a decree should have been obtained against the guardian and the amount due by him ascertained, before the suit could be maintained. A nonsuit was also moved for on the grounds taken before the Recorder.

Toomer, for the appeal.

Peronneau & Finley, contra.

CURIA per JOHNSON, J. There are only two general propositions growing out of the grounds of this motion.

1st. Whether an action on the case lies against a Master in Chancery for neglecting to take sufficient security to a Guardianship Bond.

2nd. Whether the proofs in this case were sufficient to entitle the plaintiff to a verdict.

As to the first, the authorities referred to in a former opinion pronounced by this Court between these parties (a) maintain fully, that in general an action on the case will lie against a ministerial officer for a neglect of duty by which another is injured. The neglect of the sheriff to take sufficient bail, may be given as an illustration, for which all the books agree he is liable in an action on the case. Bull. N. P. 60; 1 Bay, 328. The analogy between the duties required of a sheriff in relation to a bail bond, and of the Master in relation to a guardianship bond are so striking that I am utterly unable to discover any foundation for a distinction between them, either in respect to their nature, or the extent or manner of their liability. The same reasons which would apply in one case, it appears to me equally apply to the other. The objects to be attained are substantially the same, and the same degree of diligence and circumspection in taking the security are necessary to both, and I am utterly unable to discover why the same remedy for the neglect of such duty, is not equally applicable to both. It is said that the plaintiff's remedy is by action of debt on the bond entered into by the defendant, to the State, for the faithful discharge of the duties of the office of Master in Chancery, but in this respect also it corresponds with the case of a sheriff—he too gives bond and security for the faithful discharge of the duties of his office, and if that remedy may be waived in one case, it would seem that it might in the other.

(a.) Vide ante, 33.

Again : In the absence of any bond according to the principle before laid down, case would be the only remedy. The penalty of these bonds are in point of fact and necessarily so limited in amount. And if we suppose a case, which not unfrequently happens, that the recoveries on the bond are equal to the amount of the penalty, then according to the doctrine contended for, the plaintiff would be without a remedy, however able the defendant might be to indemnify him for the wrong.

That the plaintiff might have sued the bond is not questioned, but the right to two remedies for the same wrong, is not an anomaly. In many cases, debt and assumpsit both lie on the same contract. So, of trespass and case, and trover and detinue, and if the party has made his election, there is no reason for turning him about to recommence his suit.

In discussing the second proposition it will be conceded that the plaintiff has established by competent and sufficient testimony that the security taken by the defendant was insufficient and that the defendant was guilty of gross negligence in not ascertaining the state of the credit of the security at the time he took the bond. But that is not enough : He was bound also to show that he had been injured, and the extent of the loss he had sustained.

The proof offered to establish these facts, was that T. S. Rhodes, the guardian, was in possession of a negro woman, to which his wards, the plaintiff and Elizabeth Rhodes, were said to be entitled, and that he told the witness he had sold her for \$700, and that, it was contended was sufficient to throw on the defendant the burthen of accounting for this sum. Every one who understands the nature of the office of guardian must know that receipts and disbursements are necessarily incident to it, and until these are ascertained any estimate of the funds in the hands of the guardian must be conjectural, and at-

though the damages in this form of action are in some degree arbitrary if the plaintiff seeks to be redressed for a particular injury, the extent of which can be ascertained with certainty, he is bound to prove it.

It is contended, however, that Rhodes, the guardian, was a competent witness to prove in what manner he had applied the fund, and a presumption having arisen from the facts proved against the defendant, he might have called him as a witness to shew it.

Rhodes was equally a competent witness for the plaintiff, and might have been called by him, and until the plaintiff had made out a case which entitled him to a verdict, the defendant was not bound to prove any thing. But again—The extent of the injury sustained by the plaintiff, could only be ascertained, by an account of Rhodes' guardianship, and if he had been called by the defendant, and asked as to the state of his accounts, he might have answered, and perhaps truly, that he was ignorant as to their real situation, and the Court of Law has no power to compel him to enter into an account; and besides that, every item of that account would have been a distinct issue between the plaintiff and Rhodes, which the proceedings in this case did not put in issue, and which from the organization of the Court, it was incompetent to try.

Let us put this question in another point of view.—The measure of the defendants liability is limited by the amount wasted by the guardian; and although this is an action in form *ex delicto* in which the damages are in some degree arbitrary, an injury must be proved to entitle the plaintiff to a verdict. The guardian, by the terms of his bond, and the nature of his office, was bound to account in the Court of Chancery, and the plaintiff had it in his power to compel that account at any time he pleased, and by this means could have ascertained with pre-

cision the exact extent of the injury ; and that being the best and highest evidence in his power, he was bound to have produced it. It may be said that this evidence was equally in the power of the defendant, and that he was bound to produce it. I answer no. The defendant had ceased to be master of the Court, and he could not *ex officio* have called the guardian to account ; and the want of interest in the subject matter, would have been an answer to any application for an account at his instance. It follows, therefore, that the evidence offered by the plaintiff was incompetent, as better was in his power.

The liability of the defendant, if he be liable, grows out of the defalcation of the guardian, and I apprehend that to charge him the same proof is required as if the action had been against the guardian, and I need scarcely add, that the only means of getting at it, is through an account in the Court of Chancery. The case of *Anderson vs. Maddox*, 3 M'Cord, 287, and several others which have been decided on the same principle establish that the surety to an administration or guardianship bond is not liable until the defalcation of the principal is ascertained by an account, because it is impossible by any other means to ascertain the extent of the liability, and the same principle equally applies to the case under consideration.—The object of this action is to charge the defendant with the defalcation of the guardian, because he neglected to take sufficient security, and without an account it is equally impossible to ascertain the extent.

I was disposed on the first view to think that the motion for a nonsuit ought to prevail, but the circumstances create a very strong presumption that the plaintiff has merits, and that the necessary proof may yet be obtained. A new trial is therefore ordered.

New trial granted.

JOHN F. WALKER VS. JOHNSON & LOZIER.

Goods deposited for keeping in the store-house of a factor, who under let from a commission merchant, are not subject to distress for rent due the first lessor.

The defendant, Johnson, leased to Charles Urquhart, a store in the city of Charleston, and he again underlet a part of the premises to John Magrath. Urquhart was a commission merchant, and Magrath a factor; each appropriated their respective apartments to the purposes of their pursuits, and the plaintiff, Walker, deposited some sugars in those occupied by Magrath. Urquhart being in arrear for rent, defendant distrained on these sugars.

RICHARDSON, J. thought they were liable, and so charged the Jury, who found a verdict for the defendant. The question was whether they were liable; and this was a motion for a new trial.

Grimke, for the motion.

M'Cready, contra.

CURIA *per* JOHNSON, J. Judge Blackstone, in his commentaries on the Laws of England, (3 Vol. p. 8,) lays it down, that in general whatever goods and chattels the landlord finds on the premises, whether they in fact belong to a stranger, or the tenant, are distrainable for rent; and this rule is founded on the presumption of ownership, arising out of the fact of possession, and the danger arising from combinations between strangers and the tenant to defraud the landlord of his rent. But he allows the existence of, I think, six exceptions, and amongst them are valuable things in the way of trade, which he illustrates by the instances of a horse standing in a smith's shop to be shod, or in a common inn, or cloth at a tailor's house, or corn at a mill; from which I think it is clearly deducible that wherever the place let is appropriated by the tenant, as a common repository of goods, and are placed there by a stranger in that confidence, they are not

liable to distress for rent due by the tenant. Their liability, as before observed, arises out of the presumption of property in the tenant, from the fact of possession.— But that is repelled by the circumstance that the place has become a common place of deposit, and whether it was let with a view to that object or not, can make no difference. Unless restrained by the terms of the lease, the tenant had the right to appropriate it to any use that he might think proper, if no injury resulted to the landlord; and its being so used is notice to him that the goods found there are not necessarily the goods of the tenant. Harsh as the general rule is, it never could have been intended to subject the goods of one man to the payment of the debt of another.

The case of ——— vs. Wyatt & Richardson, 1 Bay, 102, proceeds on this principle. In that case the goods of a stranger had been sent to a vendue store for the purpose of being sold, and it was held that they were not liable to be distrained for rent due by the vendue master to his landlord; and so in Phelon vs. M'Bride, 1 Bay, 170, where it was adjudged that a negro boy, put as an apprentice to a hair dresser, was not distrainable for rent due by the master.

Taking this principle for granted, it is only necessary to the determination of the case under consideration to ascertain what was the character of the place in which the sugars were deposited, and on which they were distrained. Urquhart, the tenant, it seems was a commission merchant, and Magrath, the sub-tenant, a factor. The sugars were in the apartment occupied by the latter, and appropriated by him to the reception of all sorts of produce and merchandize which his customers and the community in general might think proper to commit to his care, either for safe keeping, or to be sold by him on commission. It was then a common repository of goods,

and according to the principle the sugars of the plaintiff were not distrainable.

I have considered this case with reference only to that part of the premises occupied by Magrath, because to whatever use the other might have been appropriated, he had fixed a character on that. But the same conclusion would follow from considering them in the custody of Urquhart, who was a commission merchant, which as I understand it, differs little from that of factor, but in a name, intended to designate those who deal principally in merchandize, from those who deal for the most part in produce of the country. Both of them derive their profits by way of commissions on sales and purchases, and neither of them exclude any article in the way of their business. The motion must therefore be granted.

COLCOCK, J. I concur as to the factor's store house, but not as to that of a commission merchant.

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ABATEMENT.

1. Where a case has been referred to arbitrators by consent of parties, and before the award is confirmed, one of the parties die, the case abates, and it is too late to confirm the award.—*Farmer vs. Frey*, 160

ADMINISTRATORS.

See Executors.

AGENT.

1. If an agent sell without disclosing the name of his principal, he will in respect to the purchaser be regarded as the principal.—*Conyers vs. M'Grath*, 392
2. To an action arising on the contract of the agent, the purchaser may in general set off a debt due by the agent to himself; but not where he has notice of the agency before his responsibility, for the agent actually accrues. *Ib.*
3. The agents being vendue masters, at whose sale the purchaser bought for cash, precludes the purchaser from discounting a responsibility which he had assumed in favour of the agent, which had not then accrued. *Ib.*
4. An agent authorized to settle an account, and to give a note in the name of the principal for the balance, is a competent witness to prove his agency and the fact of giving the note, where suit is brought on the note.—*Covington vs. Bussey*, 412
5. Where several gave a joint Power of Attorney to their agent to renew a note they had in bank, as indorsers, the renewed note must be made in conformity with the original note, as to the order of indorsements, or the agent will be considered as having exceeded his power.—*Bank vs. M'Willie*, 438

AGREEMENT.

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ARBITRATION.

1. Where a case has been referred to arbitrators by consent of parties, and before the award is confirmed, one of the

parties die, the case abates, and it is too late to confirm the award.—*Farmer vs. Frey*, 160

ASSIGNMENT.

See Insolvent Debtors.

ATTACHMENT.

See Bankruptcy.

ATTACHMENT FOR CONTEMPT.

1. An attachment for contempt in not paying over money on an execution, or for not collecting it, is in effect a civil proceeding, by which Courts compel their officers to indemnify suitors for losses sustained by neglect of duty.—*Daniel vs. Capers*, 237
2. If the party elects to proceed by attachment and receives the principal of the debt, he cannot afterwards bring an action against the sheriff for damages for the detention. *Ib.*
3. As a condition to his discharge from an attachment the Court may add that the sheriff should pay interest on the money during the period of the detention. But not having done so, the plaintiff cannot bring suit to recover interest by way of damages *Ib.*

ATTORNEY AND POWER OF ATTORNEY.

See Agent.

1. O. and T. as drawers, and defendant as indorser, gave G. a power of attorney to make the *renewals* of a note they had discounted at bank. On a suit by the bank against the defendant, as the indorser on a renewal made by G. the bank must show that the note sued on is the renewal of some original note drawn by these parties.—*Bank vs. Herbert*, 89
2. A power to renew a note at 60 or 90 days, will authorize the renewal of the note at 89 days, there being no violation of the object and intention of the parties. *Ib.*
3. By the act of 1791, attorneys at law are made liable to clerks and sheriffs for costs, when they commence actions for plaintiffs residing without the limits of the State.—*Benson vs. Whitfield*, 149
4. An attorney is not bound, but is authorized to receive money collected on an execution for his client.—*Poole vs. Gist & Roddy*, 259
5. Where a demand was placed in the hands of A. and B. attorneys in co-partnership to collect, and before the money is collected on the execution the attorneys dissolve their co-partnership, and afterwards one of them receives the money from the sheriff and gives a receipt in his own name, and neglects to pay the money over to the plaintiff, both of the attorneys are liable as co-partners. *Ib.*

AWARD.

See Arbitration.

BAIL AND BAIL BOND.

1. In debt on bail bond, the plaintiff in his declaration must set out the condition, the proceedings against the principal, and the particular breaches.—*Loker vs. Antonio*, 175

- 2 It is not enough to set out the condition, the writ, and the return thereof, and to assign as a breach that the defendant did not appear; the plaintiff should allege that he had prosecuted his writ to judgment, and had issued a ca. sa. to which there had been a return of non inventus, and that the defendant in the original action had not paid the debt, costs and charges, or any part, nor rendered his body. *Ib.*
3. Bail bonds are given to the sheriff and his successor, and may be assigned by the successor. *Ib.*
4. In an action against the bail, on bail bond, the judgment against the principal constitutes the true measure of damages.—*Kinsler vs. Kyzer*, 315
5. The case of Bryce vs. Morton was tried upon a writ of enquiry, where, if the plaintiff does not prove the extent of his damages, the Jury may, at their discretion, give merely nominal damages. But the application of the rule, even to that case, is questionable. *Ib.*
6. A bail bond taken in the Circuit Court of Common Pleas for Charleston District, may be sued upon in the City Court of Charleston.—*Legare vs. Brown*, 370
7. Where the defendant had taken the benefit of the Insolvent Debtor's Act, in a suit by the plaintiff, he cannot again be held to bail for the same debt, unless the affidavit contains a specific charge of fraud in making his assignment — *Man vs. Lowden*, 485

RAILMENT.

See Common Carrier.

1. Where cotton is sent to a gin to be ginned, the owner of the machine is bound to take the same care of it that a prudent man would bestow on his own; and of course is only liable for ordinary neglect.—*M' Caw vs. Kimbrel*. 220
2. Where the defendant's gin-house was burnt by the negligence of his servants, he was held answerable for cotton sent there to be ginned. *Ib.*

BANKRUPTCY.

1. A prior commission of Bankruptcy in England, does not give the assignees a lien over attaching creditors in this State.—*John Robinson vs. Crowder, Clough & Co.* 519
2. No effect will be given in this State to the English Bankrupt Laws, nor to any provisional assignment made in aid of those laws. *Ib.*
3. All assignments by a creditor in England, within two months of the suing out of a Commission of Bankruptcy against him are void, and the Assignees hold in trust for the assignees under the commission. *Ib.*
4. As between the Bankrupt and the Assignees under the Bankruptcy, the commission transfers all the rights the Bankrupt has, whether in England or in a foreign country. *Ib.*
5. The Assignees, however, as to foreign debts, stand in no better situation than the Bankrupt himself, and are subject to every equity, and to the remedies provided by the laws of the foreign State, and when they are permitted to sue there, it is not as Assignees, but as representatives of the Bankrupt. *Ib.*

6. An assignment in England within two months, of Bankruptcy, is an assignment in aid of the Bankrupt Laws, and will not give a lien prior to a subsequent attachment in this State, over rights attached here. *Ib.*
7. An assignment made by one partner of the effects of the firm, for the payment of their debts, though under seal, will bind the other partner. *Ib.*

BARON AND FEME.

See Husband and Wife.

BIGAMY.

1. This was a case of Bigamy, and it was held that the declarations of the prisoner, that he had married the first wife, and proof of cohabitation for fourteen years, was sufficient evidence of the first marriage.—*State vs. Britton.* 256

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The act of 1822, makes Protests of Notaries who are dead or reside out of the district where the suit is brought, evidence as well of notice to the endorser as of a demand on the drawer. The Protest should state both the demand and notice of non-payment, and is evidence of both.—*Dobson vs. Laval,* 57
2. O. and T. as drawers, and defendant as indorser, gave G. a power of attorney to make the *renewals* of a note they had discounted at bank. On a suit by the bank against the defendant, as the indorser on a renewal made by G. the bank must show that the note sued on is the renewal of some original note drawn by these parties.—*Bank vs. Herbert.* 89
3. A power to renew a note at 60 or 90 days, will authorize the renewal of the note at 88 days, there being no violation of the object and intention of the parties. *Ib.*
4. A note given by an infant for necessaries is valid.—*Dubose vs. Wheddon,* 221
5. Where several gave a joint power of attorney to their agent to renew a note they had in bank, as indorsers, the renewed note must be made in conformity with the original note, as to the order of indorsements, or the agent will be considered as having exceeded his power.—*Bank vs. M'Willie,* 438
6. But, quere.—How far is one indorser answerable over to another on an accommodation note, for the benefit of the drawer? *Ib.*
7. If the drawer of a note remains in the State, and has only changed his residence, the holder must find him out and make his demand to charge the indorser upon non-payment; but if he has removed to a foreign country, the holder is excused from making a demand.—*Gillespie vs. Hannahan.* 503
8. If the drawer is absent in any other State of the United States, he is considered as in a foreign State. *Ib.*

BOND.

See Bail Bond, Commissioner in Equity.

1. Plaintiff gave in evidence a bond purporting to have

- been executed in another state, and proved the signature of the obligor, but gave no evidence as to the signature of the witnesses. Held to be sufficient evidence of the execution of the bond under the act of 1802.—*Edgar vs. Brown*, 91
2. A bond is good, though the obligor's name be not inserted in the body of the bond, he having signed, sealed and delivered it.—*Stone vs. Wilson*, 203
3. The body of the bond mentions but one obligor, A. but it is signed sealed and delivered by A and B. Held that the bond was valid against B. *Ib.*
4. The plea of nil debet to debt on bond, is irregular, but is a substantial plea; and if the plaintiff choose to go to trial on such an issue, he must be bound by the result; and the sum found by the Jury will be presumed to be the amount actually due.—*Belser vs. Irvine*, 380
5. Either party, in an action of debt on bond, may submit the condition to the Jury, and where on the plea of nil debet the Jury have found a verdict for ten cents, the Court will not, after a lapse of ten years, interfere with a verdict, though an error might possibly have been committed. *Ib.*
6. Where the principal to a bond has been sued, and his body taken with a ca. sa. and discharged with his consent, under the provisions of the Act of 1815, it does not release the sureties.—*Treasurers vs. Johnson*, 458

BOOKS OF ACCOUNTS.

See Evidence.

CITY COURT OF CHARLESTON.

See Jurisdiction.

CLERK OF THE COURT.

1. Neither the state nor any one authorised by the state, can maintain an action against a clerk of the court of common pleas, on his bond for neglecting to record judgments recovered in his office.—*Treasurers vs. Ross*, 273
2. None but the persons injured by the neglect, can maintain the suit. *Ib.*
3. Where the successor to a clerk records the judgments so neglected, he cannot recover against his predecessor the fees for recording them. *Ib.*

COMMISSIONER IN EQUITY.

1. A master in equity is liable in law, to an action on the case, for a neglect of duty, as an officer of that court, by any one who may be injured by such neglect.—*Somerall vs. Gibbs*, 547
2. An action on the case lies against a Master or Commissioner in Chancery, for neglecting to take good security on a guardianship bond. *Ib.*
3. But the amount due by the guardian must be ascertained by a decree of the Court of Chancery, before suit can be brought against the Master; as otherwise the amount of damage cannot be ascertained. *Ib.*

COMMISSIONERS OF THE ROADS.

1. The Commissioners of the Roads have the power to alter

- or change a road belonging to their jurisdiction, for a short distance, particularly when the alteration is at the request of the individual over whose land the road runs, and where it is productive of no great inconvenience.—*State vs. Commissioners.* 5
2. Before the commissioners can fine a defaulter for not working on the roads, they must appoint a day and place, and summon him to shew cause,—*Glover vs. Simons,* 67
3. A warrant by the commissioners to collect the fines against the defaulter is void if it does not specify the amount of the fines. 1*b.*
4. The Commissioners are liable as trespassers for seizing and selling the property of a defaulter, if the above requisites are not complied with. 1*b.*
5. The commissioners have no power to compel an individual to work on his own road. 1*b.*
6. The commissioners of the Roads are authorised by the act of 1788 to cut down and use such native forest trees as are unreclaimed and unappropriated to any particular use, as may be near the high roads, private paths, bridges, &c. for the purpose of making and repairing them, notwithstanding the trees are enclosed in a fence.—*Eaves vs. Terry,* 125
7. Trees reserved for ornament, and those cultivated for use, have always been exempted. 1*b.*
8. It seems that where a parish line runs through a plantation, leaving the dwelling house and some of the negro houses in one parish, and the rest of the negro houses in the other parish, that all the slaves are bound to do road duty in the parish wherein the dwelling house is situated.—*Keckley vs. Commissioners of Roads.* 463
9. Where notice is required by an act to be given, a newspaper notice is not sufficient, unless made so by the act. 1*b.*
10. The Commissioners of Roads must give personal notice to persons called upon to do road duty or to make return of their slaves liable to do duty; and the notice must prescribe the time and place. 1*b.*
11. Though the act of 1825 requires the boards of Commissioners of each district at their first meeting after the passing of the act, to divide their respective parishes into as many road divisions as there were Commissioners, and to assign one division to each Commissioner, who is authorised to call on the inhabitants of his division, to make returns of their slaves liable to do road duty, yet they are bound to obey the notice of all the board, should no such divisions be made, or before they be made. 1*b.*

COMMON CARRIER.

1. Plaintiffs slaves were drowned, by an accident happening to defendant's steamboat, he being a common carrier, and the slaves being passengers. Plaintiff brought suit for damages. The judge charged the jury that defendant was liable for the loss of the slaves in the same manner as he would be liable for the loss of goods. Verdict set aside for misdirection.—*M^r Donald vs. Clark,* 222
2. There is a distinction between the liability of a carrier

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- with respect to the transportation of a slave and a bale of goods. *Ib.*
3. The question should have been submitted to the jury, whether the accident happened, by the negligence of the carrier, or the act of the slave, or by unavoidable accident. *Ib.*

CONSIDERATION.

See Contract.

CONSOLIDATION.

1. The court will not order a consolidation where one of the cases is within the Summary Process jurisdiction, and the other beyond it.—*Gaffney vs. Branham*, 125

CONSTITUTION.

See Legislature.

1. By the constitution of the State, members of the Legislature are privileged from being *sued* during the sitting of the Legislature, and ten days previous and subsequent thereto.—*Tillinghast and Arthur vs. Carr*, 152
2. The provision of the Constitution is not confined to cases of bail process but extends to all suits *Ib.*

CONTRACT.

1. Though a contract for overseers wages be to pay a gross sum by the year, the jury may, when the parties have differed and separated before the end of the year, apportion the damages to the services actually rendered, to effect substantial justice.—*M^r Chure vs. Pyatt*, 26
2. Every valid contract must have a good and valuable consideration, and when set out in pleading either as the foundation of an action or by way of defence, it must appear on the record.—*Corbett vs. Lucas and Dotterer*, 323
3. There can be no such thing as a release after contract broken, except by deed, and it must be so pleaded. *Ib.*
4. A party may bind himself by parol to release, but it must be on sufficient consideration, and although such a contract may furnish sufficient ground of defence, as payment, accord and satisfaction, &c. yet technically it is not a release. *Ib.*
5. If the release is under seal, it implies a consideration; otherwise if not under seal, and the consideration must be proved. *Ib.*
6. An assignment purporting to be between two parties is void, unless signed by both.—*Cline vs. Black*, 431
7. Where a seal is not essential to the validity of a contract the addition of a seal will not vitiate it.—*John Robinson vs. Crowder, Clough & Co.* 519

CO-PARTNERS AND CO-PARTNERSHIP.

1. Where one of several partners is resident here or within the jurisdiction of the Court, the absent co-partner cannot be made a party defendant in a process against the firm, by attachment either directed against his private property, or the property of the firm, and the only mode of making him a party, is by serving the usual process on

the resident partner, in the manner prescribed by the act of 1792.—*Bank vs. Broadfoot and M'Neil*,

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2. One of several co-partners can discharge his individual debt to a third person, by releasing or giving a receipt to such person for a debt due by him to the firm.—*Halls, Kirkpatrick & Co. vs. Cos, Green and Randolph*,
3. Where a demand was placed in the hands of A. and B. attorneys in co-partnership to collect, and before the money is collected on the execution the attorneys dissolve their co-partnership, and afterwards one of them receives the money from the sheriff and gives a receipt in his own name, and neglects to pay the money over to the plaintiff, both the attorneys are liable as co-partners.—*Poole vs. Gist and Roddy*,

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COSTS.

1. By the act of 1791, attorneys at law are made liable to clerks and sheriffs for costs, when they commence actions for plaintiffs residing without the limits of the State.—*Benison vs. Whitfield*,
2. Where a verdict has been found in favor of one of several joint defendants, he is entitled to have his costs. But where the costs have been joint, as a joint appearance, plea, subpoena, &c. he is only entitled to half costs.—*M'Clure vs. Sutherland*,
3. But if a particular expense has been incurred, as if a witness has been examined by commission for him alone, the defendant acquitted will be allowed full costs for such items.
4. It is too late to save costs to tender money after a writ has been taken out, and signed and sealed by the clerk, although it has not yet been lodged with the sheriff. The plaintiff has already incurred the costs, and if the defendant admits the debt, he must pay the costs accrued. But the defendant having paid the money into Court, which was taken out by the plaintiff, except so much as would pay the costs, it was held that the plaintiff's accepting the money discharged the defendant from payment of costs.—*Hinchie vs. Foster*,
5. Costs not allowed on appeals from the ordinary.—*Boulwar vs. Pickett*,
6. Where a defendant takes the benefit of the Insolvent Debtors Act, and does not assign enough to pay the Gaoler's fees, he may recover them of the plaintiff at whose suit he was confined.—*Hyams vs. Black*,

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COVENANT.

See *Covenant to Stand Seized. Landlord and Tenant.*

COVENANT TO STAND SEIZED.

1. A covenant to stand seized to uses must be supported by a good or valuable consideration, and the insertion of the words "having received full value," or "for divers good causes and considerations," will not support such a covenant.—*Singleton vs. Bremar*,
2. On complaint of a breach of covenant, the recovery must be measured by the consideration paid.

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Ib.

3. The doctrine of covenants to stand seized stated.—*Ingram vs. Porter*, 198

DAMAGES.

See Contract and Overseers.

1. The defendant shot the plaintiff's slave while he was stealing potatoes from a bank at night, and killed him.—The Court held the defendant liable for the value of the negro, and granted a new trial, the Jury having found a verdict for one dollar.—*Richardson vs. Dukes*, 156
2. In assessing damages where property is in question, the value of the article, as nearly as it can be ascertained, furnishes a rule from which the Jury are not at liberty to depart. *Ib.*

DEEDS AND DEEDS OF GIFT.

1. A fee cannot be limited to take effect in futuro; therefore a deed of a tract of land "in case of my death to A." is void as a conveyance.—*Singleton vs. Bremar*, 12
2. An instrument having the formality of a deed, may operate as a will, being voluntary and to take effect at the death of the maker. *Ib.*
3. A covenant to stand seized to uses must be supported by a good or valuable consideration, and the insertion of the words, "having received full value," or "for divers good causes and considerations," will not support such a covenant. *Ib.*
4. On complaint of a breach of covenant, the recovery must be measured by the consideration paid. *Ib.*
5. A father by deed of gift gave to his daughter a slave "to hold, &c. after his death." Held that the right of property vested immediately in the daughter, and her right was barred by the statute of limitations, during the life of the father.—*Ingram vs. Porter*, 198
6. A future interest in a chattel, opposed to the present interest in the grantor, cannot be created. *Ib.*
7. Where the habendum of a deed is wholly inconsistent with the premises, so that they cannot stand together, the habendum must be considered as void. *Ib.*
8. The doctrine of covenants to stand seized stated. *Ib.*
9. A paper sometimes in form of a deed, may be considered as a will. *Ib.*
10. Delivery of a deed to a proper officer to record, is such a delivery as consummates the deed. *Ib.*
11. The general rule is, that if a blank piece of paper be signed, sealed and delivered, and afterwards written it is no deed, as there is nothing of substance in it.—*Duncan vs. Hodges*, 239
12. A deed executed with blanks, and afterwards filled up and delivered by the agent of the party is good. *Ib.*
13. It is not sufficient evidence of the execution of a deed of conveyance, to prove the hand writing of one of the subscribing witnesses, who was dead, the witness knowing nothing of the grantor, or the other subscribing witness. The signature of the grantor and of the other sub-

- scribing witness, if he were dead or out of the State, must be proved.—*Sims vs. De Graffenreid*, 253
14. A deed cannot be admitted as an ancient deed, unless it has been accompanied by possession. *Ib.*
15. It is not necessary that a seal should be made of wax — *Relph & Co. vs. Gist*, 267
16. The impression, and not the wax, makes the seal. *Ib.*
17. Whether the impression was intended for a seal is always a question of fact for the Jury, whether made of wax, ink, or otherwise. *Ib.*
18. If the body of the instrument does not shew the intention to make a scrawl a seal, it may be shewn from the scrawl itself, or by evidence aliunde. *Ib.*
19. As where the L. S. is enclosed with the scrawl, proof that the letters are in the hand writing of the obligor. *Ib.*
20. Or where a person uses a symbol or cypher, that it has usually been employed for the purpose of a seal and no other. *Ib.*
21. Parol evidence is admissible to prove that the party intended the scrawl for his seal. *Ib.*

DEVISE.

See Will.

DISCOUNT.

See Statute of Limitations.

1. Where the defendant sets up a discount, and pays the balance of plaintiff's claim into Court, the plaintiff having refused to receive it before suit, if the Jury allow his discount they may find for defendant, and thereby cause the plaintiff to pay costs.—*Shiel vs. Randolph*, 146
2. All objections and pleadings in reply to a discount are ore tenus, and require no previous notice; and a discount barred by the statute of limitations is inadmissible if objected to.—*Turnbull vs. Strohecker*, 210
3. To an action arising on the contract of the agent, the purchaser may in general set off a debt due by the agent to himself; but not where he has notice of the agency before his responsibility for the agent actually accrues.—*Conyers vs. McGrath*, 392
4. The agents being vendue masters, at whose sale the purchaser bought for cash, precludes the purchaser from discounting a responsibility which he had assumed in favour of the agent, which had not then accrued. *Ib.*
5. Where the defendant bought, at the sale of the Commissioner in Equity, a tract of land, sold for the purposes of a division, and described as "all that tract said to contain 449 acres, more or less, situate, lying and being, &c. &c. &c. it was held that the purchaser could not set up by way of discount to a suit on his note given for the purchase money, that upon a re-survey there was a deficiency of 29 acres.—*Commissioner vs. Thompson*, 434
6. There is no implied warranty at the sale of a public officer, and no deduction will be allowed for a deficiency, unless it amounts to a failure of consideration, or defeats

- the great object of the purchaser, or furnishes satisfactory evidence of a total mistake in the character of the land. *Ib.*
7. Where a tract of land is sold in gross, and the number of acres mentioned merely as a part of the description, without any warranty or representation by which the purchaser is misled, no deduction pro tanto, will be allowed for a deficiency of acres. *Ib.*
8. Too easy an ear should not be lent to defences of this sort in cases of public sales. *Ib.*

DISTRESS.

See Landlord and Tenant.

1. Where a tenant had leased premises for six years, and gave his bond for the payment of the rent in gross, it was held that the landlord might, notwithstanding, distrain for the rent, the bond not having been paid.—*Price vs. Limehouse.* 544
2. It is not necessary to support a distress that rent should be reserved *eo nomine*, if it appear really to be due. *Ib.*

DOWER.

1. The mere transitory seizin of a husband of land for the purpose of re-conveying by way of mortgage, will not entitle the wife to dower; and if the deed of conveyance and mortgage are simultaneous, the widow can only be entitled to dower subject to the mortgage, or to her dower out of the surplus over and above that incumbrance.—*Brown vs. Duncan.* 346
2. The value of the land at the time of alienation must be taken as the basis of calculation. *Ib.*
3. The Commissioners ought to assign the dower in the land itself, and not assess a sum of money in lieu thereof; but by the Act of Assembly they are made the judges of the question, and if they assess a sum of money, unless it is apparent that they have committed some error, their decision must be final. *Ib.*
4. The Court refused to set aside their return where they assessed a sum of money, stating that the dower could not be set off by metes and bounds without great injury to all the parties concerned. *Ib.*
5. It is doubtful if the Court can enquire into the reasons of their decision. *Ib.*
6. They are required to go on the premises to enable them the better to judge of the matter. *Ib.*

EASEMENT.

See Servitude.

ELECTION.

1. Though the court of law has not the power to enforce an election, it may determine from the facts of the case whether the party has elected, and settle the rights of the parties accordingly.—*Hill vs. Hill.* 277

ESCHEAT.

1. When by deed a use is limited to a person, an alien for life, with a power of appointment, and in case of failure of

appointment to her right heirs—held, that she having made an appointment and died, before office found, the estate in the hands of the appointees, citizens, was not subject to escheat, office not having been found during her life time.—*Escheator vs. Smith.* 452

ESTOPPEL.

1. An estoppel must be reciprocal and equally binding on both parties.—*Crosland vs. Maddock,* 217
2. Devise to an executor to sell lands. He sells to A. In the mean time the ordinary gives judgment against the will, and the jury confirms his judgment. To a suit against the purchaser for the purchase money, the judgment of the ordinary thus affirmed, is no estoppel against the suit by the executor. *Ib*
3. Where a tract of land was sold by the sheriff under an execution against the defendant, in an action of trespass to try titles, by the purchaser against the defendant, the defendant will not be permitted to give evidence that the title of the land was not in himself, but in another whose tenant he was.—*O'Neal vs. Duncan,* 246
4. The Sheriff's title, (being the organ of the law to convey the defendant's right,) is considered as the deed of the defendant, and operates as an estoppel. *Ib*

EXECUTIONS.

See Lien—Prison Bounds.

1. A mere equity is not the subject of an execution and though in England an equity of redemption cannot be levied on, yet here the right of the mortgagor being a legal one, may be levied upon and sold.—*State vs. Loyal,* 336
2. The purchaser takes the place of the mortgagor; with all his rights, privileges and disabilities. *Ib*
3. If the land be sold under an execution older than the mortgage, the purchaser takes it discharged of the mortgage, and if he purchases under the mortgage, he takes it subject to the judgment. *Ib*
4. If land be sold under a junior execution, the purchaser acquires a good title, and the money is applied to the several executions according to their priority. *Ib.*
5. The execution is considered as a mere authority to sell without regard to the distribution of the fund afterwards. *Ib.*
6. It seems that judgments and executions, though dormant, preserve their liens for any indefinite period of time. *Ib*
7. Where a purchaser buys under an execution, there being a prior mortgage, he takes subject to the mortgage, and may redeem. *Ib.*
8. But where there were prior and subsequent judgments and an intermediate mortgage, and the purchaser bought under a judgment subsequent to the mortgage, on a rule against the Sheriff by the owner of the subsequent judgment to shew cause why the money was not paid over to his execution, the Court refused to decide the rights of the parties on a rule, and thought the remedy was in Equity, the prior judgment and mortgage creditors to be made parties. *Ib.*

EXECUTOR AND ADMINISTRATOR.

See Will—Estoppel.

1. An executor party to an issue of *devisavit vel non*, though he takes nothing by the will, cannot be examined as a witness in the cause.—*Vinyard vs. Brown*, 24
2. General rule, that no party to a cause can be examined as a witness. *Ib.*
3. By the act of 1788, simple contract debts due to citizens of this State are put upon the same footing as specialties, in the administration of the assets, within the State, of a deceased person not a citizen of South Carolina. But the debts of the citizens are not to be paid in total exclusion of debts to foreigners.—*Mitchell vs. Fayolle*, 28
4. The executor of an executor does not represent the first testator unless probate has been taken out on the will of the testator by the first executor. Where the will was proved per testes, and a decision by the ordinary in favor of the will, but the granting of letters of administration suspended by an appeal from the ordinary and in the mean time the executor dies, his executor does not represent the first testator. To constitute probate letters testamentary must be granted on the will.—*In matter of Drayton's Will*, 46
5. Where the plaintiff, an administrator, charges in his declaration a promise to his intestate, and the statute of limitations is pleaded, replication that within four years, defendant promised intestate, and since his death the administrator; demurrer supported to so much as replied a promise to the administrator, as a departure from the declaration; but new trial granted to plaintiff with leave to add a count, to meet the justice of the case.—*Jamison vs. Lindsay*, 93
6. To suit on an administration bond, the declaration, going only for the penalty without setting out breaches, the defendant craved oyer, set out the conditions and pleaded performance. The plaintiff replied that the administratrix had not truly administered, because she had not paid a certain debt. Demurrer, on the ground that plaintiff did not allege that the administratrix had asset to pay the debt.—Demurrer supported.—*Jones vs. Anderson*, 113
7. Suit cannot be brought on an administration bond against the sureties until the administrator has been called to account and a judgment obtained against him. *Ib.*
8. But where creditors sue, quere if it is enough to shew a judgment against the administrator on a plea of plene administravit, and a return of nulla bona? Or should further proceedings be had against the administrator? *Ib.*
9. The lands of an intestate may be sold under an execution obtained against the administrator, without making the heirs parties to the proceedings, notwithstanding there may be sufficient personal assets to satisfy the debts.—*Martin vs. Latta*, 128
10. The executor derives his authority over the goods of the testator from the grant of the ordinary, but not so with regard to lands devised, or a power to sell lands; these the

- devisee takes directly under the will, from the testator.—
Crosland vs. Murdock, 217
11. Although a debt from the intestate to the administrator may not yet have fallen due, he may notwithstanding retain funds for the payment of it, in preference to debts of an inferior grade.—*Relph & Co. vs. Gist*, 267
 12. In marshalling the assets of an insolvent estate, a judgment recovered in another State only ranks as a simple contract.—*Cameron vs. Wurtz*, 278
 13. The intermeddling necessary to render a person liable as executor of his own wrong, must be such as manifests a right to exercise a control, or make disposition of the effects of the deceased.—*Givens vs. Higgins*, 286
 14. In some of the old cases the doctrine has been carried to an extraordinary extent. *Ib.*
 15. Where a person interfered with the property merely at the request of the widow, to remove it to another place, where she had changed her residence, and did some other acts of no great importance at her request, the Court held that he was not liable as executor de son tort. *Ib.*
 16. Persons acting as agents for the widow, as an overseer employed by her, or a carrier to take the crop to market, or a factor to sell it, &c. not knowing in what character she was acting, would not be liable. *Ib.*
 17. After a case has been three years on the issue docket, the defendant will not be permitted to withdraw the general issue to plead ne unques executor.—*Warner vs. Condy & Raguet*, 344
 18. If an executor makes protest in his declaration, and the defendant pleads to the action, he admits the plaintiff to be properly in Court. The letters are then taken out of Court, and the defendant cannot call for them again. *Ib.*
 19. The statute of limitations will not commence to run before administration taken out.—*Geiger vs. Brown*, 423

EVIDENCE.

See Witness—Will.

1. On an indictment for stealing the property of A. B. and C. proof that the defendant stole some of the goods of each of them respectively, in which they had no joint interest does not correspond with the allegation, and new trial granted on conviction.—*State vs. Ryan & Jones*, 16
2. The act of 1822 makes Protests of Notaries who are dead or reside out of the district where the suit is brought, evidence as well of notice to the endorser as of a demand on the drawer. The Protest should state both the demand and notice of non-payment, and is evidence of both.—*Dobson vs. Laval*. 57
3. The books of the Keeper of a Billiard Table, are not admissible evidence.—*Boyd vs. Ladson*, 76
4. The cases, as to the admission of books of accounts in evidence, reviewed and considered. *Ib.*
5. Plaintiff gave in evidence a bond purporting to have been executed in another State, and proved the signatures of the obligor, but gave no evidence as to the signatures

- of the witnesses. Held to be sufficient evidence of the execution of the bond under the act of 1802.—*Edgar vs. Brown*, 91
6. "I have paid the money, but if I cannot shew that I have paid it, I will not plead the statute," is sufficient to take a case out of the statute of limitations.—*Jamison vs. Lindsay*, 63
7. Where the plaintiff, a merchant, was absent from the State, at trial of the cause, held that proof of the original entries being in his hand writing, was incompetent evidence.—*Douglass vs. Hart*, 257
8. The only cases where the entries have been proved by others than those who made them, have been in cases, tried on writs of enquiry. It is never permitted where the defendant appears and defends the case. *Ib.*
9. The cases of *Foster vs. Sinkler*, 1 Bay, 38, and *Spence vs. Saunders*, 1 Bay, 115, were cases tried on writs of enquiry, *Ib.*
10. The declarations of a party in favor of his own title is admissible evidence, where they form a part of the res gestæ.—*Martin vs. Simpson*, 262
11. The declarations of a witness, that he is interested in the event of a suit, are not, per se, sufficient to deprive the party by whom he is called of the benefit of his examination.—*Cotchett vs. Dixon*, 311
12. To exclude a witness, it is not enough that he has an interest in the subject matter of litigation, it must be an interest in the event of the particular cause. *Ib.*
13. If the witness is not a party to the suit, the presumption is in favor of his admissibility, and the party objecting must shew his interest, which he may do by examining the witness on his voir dire, or by evidence aliunde. *Ib.*
14. The entry of a nonsuit on the back of a declaration, is evidence of the termination of that suit in the Court alone where the nonsuit was ordered. In any other Court, evidence of the record of the judgment must be produced.—*Baker vs. Delieasseline*, 372
15. In an action against the Sheriff for an escape under mesne process, evidence that the plaintiff in the original suit, after the escape, suffered a nonsuit, is not conclusive evidence that he has sustained no injury. *Ib.*
16. After an escape, the plaintiff may proceed against the Sheriff immediately, without further prosecuting his suit against the principal; but if he do so, and abandon it, or be nonsuited, that nonsuit is not *conclusive* in favor of the Sheriff. *Ib.*
17. Where a defendant is in custody on mesne process, and the plaintiff is nonsuited, the Sheriff may discharge the defendant. *Ib.*

FEE SIMPLE.

See Will.

1. A fee cannot be limited to take effect in futuro; therefore a deed of a tract of land "in case of my death to A." is void as a conveyance.—*Singleton vs. Bremer*, 12.

FEME COVERT.

See Husband and Wife.—Uses and Trusts.

FRAUDS AND FRAUDULENT CONVEYANCES.

See Parol Gift.

1. The concealment of a circumstance, which materially impairs the value of an article sold, is fraudulent, and though the vendor at the time of sale refused to warrant the soundness, yet the vendee may recover in an action of deceit.—*Hough vs. Evans*, 169
2. The statutes of the 13th and 27th Eliza. against Frauds, only enacts the principles of the Common Law.—*Hudnal vs. Teasdale*, 294
3. It is not the act of conveying voluntarily which renders the deed void, but the intention with which it is done. *Ib.*
4. Fraud always to be inferred from the circumstances. *Ib.*
5. Trustees of Holman vs. Greenwood, 1 Bay, 173, not a case of authority. *Ib.*
6. When a voluntary deed was intended to secure property from the reach of creditors, it is void against subsequent purchasers as well as creditors, where the possession has not been changed. *Ib.*
7. Whenever a deed is void, merely against creditors, the payment of the debts will cure the defect; but where it is attended with circumstances which authorize a belief that no change of property was actually intended to take place, but that it should revert to the donor, as soon as the debts are paid, the rights of a subsequent purchaser cannot be effected by the payment of the debts. *Ib.*
8. It seems there is no difference between cases of real and personal property, as to subsequent purchasers; and the Court will in both instances give effect to a bona fide sale without notice against a voluntary deed. *Ib.*

FRAUDS, STATUTE OF

1. M. having an execution in the hands of the sheriff against one S. the defendant Q. promised the sheriff that if he would not push the execution, he would pay the costs, in consequence of which the sheriff did not proceed.—whereupon M. sued Q. for the costs—held the promise to be within the statute of frauds, not being in writing and void for want of consideration.—*McKinnie vs. Quilter*, 409

FREEHOLD.

1. An instrument to convey a freehold must be under seal.—*Cline vs. Black*. 431

GAMING.

1. The Statute of 9 Ann. C. 14, against gaming, is made of force in this State by the Act of 1712, making of force all Statutes passed between the eighth year of that Queen and the passing of the act in 1712.—*Atchison vs. Gee*. 211
2. Though horse racing is not mentioned in that Statute, yet it is included under the words, "other game." *Ib.*
3. A bet over £10 lost on a horse race, and paid by the loser, may be recovered back within three months, under the provisions of that Statute. *Ib.*

GOVERNOR.

1. Prohibition will not lie against the Governor to restrain him from granting a commission to an officer who has been improperly elected.—*Grier vs. Gov. Taylor.* 206

GRANT.

1. A grant to one dead at the time is void.—*Smith vs. Smith,* 276

GUARDIANS.

See Commissioner in Equity.

1. A suit at law cannot be maintained on the bond of a Guardian or Committee of a Lunatic, unless the Guardian has accounted, or a specific sum is ascertained to be due.—*James vs. Wallace.* 121
2. The Chancellor's ordering the Bond to be sued at Law, can give no jurisdiction. *Ib.*
3. Where Guardians and Trustees fail to make their annual returns, as required by the Act of Assembly, they must be proceeded against in Equity, and not at Law. *Ib.*

HABEAS CORPUS.

1. The Court of Common Pleas have no power under a writ of Habeas Corpus to discharge a person in custody, under a writ of ne exeat issued from the Court of Equity.—*Ex parte Gilchrist,* 233

HORSE RACING.

See Gaming.

HUSBAND AND WIFE.

1. If the husband depart from the State, for the purpose of a residence abroad, without the intention of returning, such absence renders the wife competent to contract, and to sue and be sued, as if she were a feme sole.—*Bean vs. Morgan,* 148
2. No suit can be brought by or against a feme covert sole trader, unless her husband be joined.—*Star & Cleland vs. Taylor,* 413
3. A feme covert, though living apart from her husband on her separate estate, cannot be sued without joining the husband.—*Brown vs. Killingsworth,* 429
4. Where the husband has abjured the realm, the wife is considered as a feme sole, and may sue and be sued alone. *Ib.*

INDICTMENT.

See Retailing.

1. Where the defendant in a State case offers no evidence, his counsel are entitled to the reply; but where cross-indictments are taken up and tried together, and the defendants witnesses are examined on the indictment which he preferred, the State is entitled to the reply.—*State vs. Chreitzburgh,* 30
2. With the consent of the prisoner, the State may examine witnesses by commission.—*State vs. Brown,* 254
3. Quere.—If in any case the Court will grant a new trial on the part of the State? *Ib.*

4. In an indictment for erecting or keeping a house, which is a nuisance to the neighborhood, two things only are necessary to be stated:—1st. That from the nature of the establishment it may be an annoyance; and, 2dly. That from its situation it has actually become so.—*State vs. Purse*, 472
5. A house, which from the purposes for which it is used, or the situation in which it is placed, may not be a nuisance may become so by negligence in keeping it. When that is the ground for prosecution, it must be so laid in the indictment. 1b
6. Where a person is in the habit of using only initials for his christian name, and was so indicted, and it was proved that he was so known and called himself, and the fact whether it was so known is put in issue and the Jury convicts him, the Court will not interfere on that ground.—*City Council vs. King*, 487
7. A man may take whatever name he pleases, and if he by his own conduct renders it doubtful what his real name is, the fault is his, and he must take the consequences. 1b

INFANT.

1. A note given by an infant for necessaries is valid.—*Dubose vs. Wheddon*, 221
2. Contracts with infants are void or voidable. Those which are voidable only impose a qualified obligation, and if the infant after coming of age elect to perform, it will be enforced against him.—*Cheshire vs. Bennett*, 241
3. A very slight circumstance shewing his assent to the contract, after the infant comes of age, will confirm the contract. 1b
4. If he purchases land, and continue in possession after he comes of age, and if he buys a horse which he retains and uses after he becomes twenty-one, it will amount to a confirmation. 1b
5. Where an infant gave his note for a horse, payable to A. or bearer, and kept the horse after he became twenty-one, and sold him, it was held a confirmation, and that the bearer of the note, to whom it had been transferred, might recover it. 1b
6. An infant, at the age of discretion, is liable in an action on the case, for the embezzlement of goods entrusted to his care: *Peigne vs. Sutcliffe*, 387

INSANITY.

1. Eccentricity, however great, is not sufficient to invalidate a Will: the mind is presumed to be sound until the contrary is clearly proved.—*Lee vs. Lee*, 183
2. Nor is it sufficient to shew that the imagination of the testator was generally disturbed with a strange belief in witches, devils, and evil spirits, which he fancied continually worried him, and that he lived in the strangest manner, wearing an extraordinary dress, sleeping in a hollow log, and exhibiting other extravagancies, the man being able in other respects to manage his affairs. 1b

3. To avoid a Will for insanity, a case of general insanity must be made out, or particular insanity at the time of executing it. 1b.
4. It is not every man of a frantic appearance and behaviour who is to be considered a lunatic. 1b.
5. If general insanity is proved, he that sets up the instrument must shew a lucid interval. 1b.
6. That a Will is unjust to one's relations, is no legal reason that it should be considered an irrational act. 1b.
7. The law puts no restrictions upon a man's right to dispose of his property in any way his partialities, or pride, or caprice may prompt him. 1b.
8. The number, intelligence, and character of the witnesses on a question of insanity, should have great weight with the Jury. 1b.
9. The Court will not lend a ready ear to an objection against the validity of a party's own acts, on account of incapacity brought on by drinking.---*Hall vs. Mooreman*, 283

INSOLVENT DEBTORS.

See Prison Bounds.

1. The assignees of an insolvent debtor taking the benefit of the insolvent debtor's act, may be compelled on rule, to account before the Court of Common Pleas; and if the accounts are complicated, it may be referred to the Clerk to report on them.---*Hurth vs. Gibbes*, 8
2. Liens existing before the assignment still have preference as to the proceeds of the property assigned, and are payable in their order. But an execution does not bind money, and the cash and proceeds of choses in action assigned, are payable rateably among all the creditors, the expenses of the assignment and commissions first deducted. 1b.
3. In marshalling the assets of an insolvent estate, a judgment recovered in another State only ranks as a simple contract.---*Cameron vs. Wurtz*, 278
4. The defendant took the benefit of the Insolvent Debtor's Law of Georgia, and among his creditors, residing in that State, and for whose benefit the assignment was made, was a mercantile house to which the plaintiffs were members. The note sued on was for a debt due before the assignment. Upon suit being brought against the defendant in South Carolina on the note, held that as both plaintiffs and defendant were citizens of Georgia, the discharge in Georgia was conclusive against the plaintiffs in this State.---*Brown & Overstreet vs. Wallen*. 364
5. Where the defendant had taken the benefit of the Insolvent Debtor's Act, in a suit by the plaintiff, he cannot again be held to bail for the same debt, unless the affidavit contains a specific charge of fraud in making his assignment.---*Man vs. Lowden*, 485
6. Where the defendant takes the benefit of the Insolvent Debtor's Act, and does not assign enough to pay the gaoler's fees, he may recover them of the plaintiff at whose suit he was confined.---*Hyams vs. Black*, 508

INSURANCE.

1. The insured cannot abandon for a total loss, unless the loss from the sea damage exceed one half of the goods insured, or the gross amount paid for them.—*Schult & Budd vs. U. Ins. Com.* 1
2. Where the Jury give a verdict for a partial loss, it does not follow that they must give interest on the amount of loss, and the verdict will not be disturbed where the defendants had offered to pay the partial loss. 1b.
3. It is not a breach of warranty, on a policy "at and from Charleston to Marseilles," that the vessel had been laden at Havana, a belligerent port, but whether the fact constituted a misrepresentation or not, was for the Jury.—*Money vs. U. Ins. Com.* 511
4. A fact known to the underwriters need not be stated in the offer. 1b.

INTEREST.

1. Where there is a written lease to pay a certain sum annually, if it be not paid annually, it carries interest.—*Dorrill vs. Stephens,* 59
2. Where the lease is for a term of years, with an annual rent, if the tenant holds over the term, without any thing being said as to a new contract, the law presumes that he holds subject to the same annual rent as stipulated in the contract, and if interest is recoverable on the annual arrears of the written lease, it will also be recoverable on the subsequent annual arrears. 1b.
3. Judgments at Common Law do not carry interest.—*Williamson vs. Broughton,* 212
4. By the Act of 1815, interest is allowed on judgments recovered on causes of action which bore interest themselves, and the interest may be collected on the execution. 1b.
5. Judgments only give a lien to the amount recovered, and if an action of debt is subsequently brought on the original judgment, not bearing interest, and interest is recovered by way of damages, and before the second judgment, other judgments are obtained, the first judgment only gives a lien for the amount then recovered, and the interest recovered by way of damages on the second judgment, cannot have a prior lien to the intermediate judgments of third persons. 1b
6. Where judgments have been recovered after that act, and then actions of debt are brought on the judgments recovered previous to the act of 1815, and interest recovered by way of damages, in distributing the funds of the debtor, only the amount of the judgments as recovered before 1815, are to be paid before the judgments recovered after that act, and the damages recovered in the actions of debt on the first judgments, come in after the judgments are satisfied which were recovered after the act, and prior to the judgments in the cases of debt on the previous judgments. 1b
7. Unliquidated demands do not bear interest, except in

cases where the defendant has been guilty of fraud or imposition.—*Conyers vs. M'Grath* 302

JUDGMENTS.

See Interest.

1. Lands are only bound by judgments on summary process from the time they are entered on the judgment docket.—*Foster vs. Chapman*, 291
2. But the judgment of the Court in summary process cases is the decree entered by the clerk on the minutes of the Court, and that is sufficient evidence, in an action of debt on such judgment. *Ib.*

JURISDICTION.

1. Although a person cannot give jurisdiction by consent to a Court where it had no jurisdiction before, yet where the Court has jurisdiction of the matter, and the party has some privilege which exempts him from the jurisdiction, he may waive the privilege if he chooses.—*Overstreet & Co. vs. Brown & Co.* 79
2. Where one of two partners reside out of the State, it does not take away jurisdiction of the case from the City Court of Charleston; as the act of 1792 provides that where one of two partners is out of the State, the other shall be liable to an action in the same manner as if he were the sole contracting party, which act applies to all Courts. *Ib.*
3. A bail bond taken in the Circuit Court of Common Pleas for Charleston District, may be sued upon in the City Court of Charleston.—*Legare vs. Brown*, 370
4. The City Court of Charleston has not jurisdiction over offenders for bringing free negroes into the City of Charleston, contrary to the act of 1823, prohibiting their being brought into the State.—*State vs. Shaw*, 480
5. Where a person is sued by the City Council of Charleston, for the penalty for retailing without a license, in the City of Charleston, the Recorder has jurisdiction of the case, if the offence is committed within the City, whether the defendant resides in the City or not.—*City Council vs. King*, 487
6. By the act of 1823, the penalty must be sued for by the City Council, and a *qui tam* is not necessary. *Ib.*

LANDLORD AND TENANT.

1. Where the tenant holds over his term, and the landlord recovers double rent under the act of 1808, he cannot bring case afterwards against the tenant for holding over, whereby he lost the sale of the premises. *Quere.*—If the plaintiffs under any circumstances could recover for such remote consequential damages?—*Crips vs. Talvande*. 20
2. Where there is a written lease to pay a certain sum annually, if it be not paid annually, it carries interest.—*Dorrill vs. Stephens*. 59
3. Where the lease is for a term of years, with an annual rent, if the tenant holds over the term, without any thing being said as to a new contract, the law presumes that he holds subject to the same annual rent as stipulated in the contract, and if interest is recoverable on the annual

- arrears of the written lease, it will also be recoverable on the subsequent annual arrears. *Ib.*
4. The act of assembly exempting certain articles of a debtor from levy and sale, includes as well levies and sales under distress warrants for rent, as under executions.—*Caulfield vs. M'Alister*, 378
5. Covenant on the part of a lessee to keep the house in good repair,—if the house is destroyed by fire, he must rebuild; and if the lessee stands by and permits the landlord to rebuild for his own benefit, and sets up no claim, it is an abandonment of all claim on his part.—*Cline vs. Black*, 431
6. Under a plea of no rent in arrear, the defendant may shew that the house was rendered uninhabitable by a storm.—*Ripley vs. Wightman*, 447
7. It seems, if one rents a house for a year, and during the term it is rendered untenable by a storm, the rent ought to be apportioned according to the time it was occupied. *Ib.*
8. If the tenant consents to the landlord's impounding goods distrained on the premises, a person who rescues them cannot make that objection when sued for the rescue.—*Blake vs. De Licseline*, 496
9. There is no fixed period, after which a person may not distrain goods on the premises for rent in arrear; nor will a prior dormant execution, take the money in preference to the distress. *Ib.*
10. If the execution had been levied before the distress, or even if it had been issued before, and had been in active operation, it might have been otherwise. *Ib.*
11. In an action for a rescue by the landlord who has distrained the goods, though he cannot recover interest, as a matter of course, yet the Jury may make the rate of interest the measure of damages. *Ib.*
12. The Court having allowed interest by its judgment on special verdict, judgment ordered to be set aside unless the plaintiff released the interest. *Ib.*
13. Goods deposited for keeping in the store-house of a factor, who under let from a commission merchant, are not subject to distress for rent due the first lessor.—*Walker vs. Johnson & Lozier*, 552

LANDS.

1. Lands are only bound by judgments on summary process from the time they are entered on the judgment docket.—*Foster vs. Chapman*, 291
2. But the judgment of the Court in summary process cases, is the decree entered by the clerk on the minutes of the Court, and that is sufficient evidence in an action of debt on such judgment. *Ib.*
3. The lands of an intestate may be sold under an execution obtained against the administrator, without making the heirs parties to the proceedings, notwithstanding there may be sufficient personal assets to satisfy the debts.—*Martin vs. Latta*, 128

LARCENY.

See Receiver.

1. On an indictment for stealing the property of A. B. and C. proof that the defendant stole some of the goods of each of them respectively, in which they had no joint interest, does not correspond with the allegation, and new trial granted on conviction.—*State vs. Ryan & Jones*, 16

LEASE.

See Landlord and Tenant.

LEGISLATURE.

See Members of Legislature.

1. In general the Legislature cannot prescribe and establish a new rule and give it a retrospective operation, but where the rule is unascertained and unsettled, it belongs to the legislature to ascertain and settle the law, and from necessity such a law must operate both prospectively and retrospectively.—*Peyton vs. Smith*, 476
2. The legislature may order a street to be opened over the lands of an individual without making compensation.—*Patrick & Mannigault vs. Commissioners of Cross Roads on Charleston Neck*, 541

LIBEL.

1. A libel is a censorious or ridiculing writing, picture, or sign, published with a mischievous and malicious intent, towards government, magistrates, or individuals.—*State vs. Farley*, 317
2. On an indictment for a libel, words spoken by the defendant cannot be given in evidence, in support of the innuendoes. *Ib.*
3. The following words were held not libellous, "As Mrs. Reynal says she has been most cruelly censured without a cause, which is absolutely false, I would advise her, &c." *Ib.*
4. So, "I would advise her to beware, lest facts, which are stubborn things, be brought to light, and you will then see who you keep under your roof," was held not libellous. *Ib.*
5. There must be a malicious and mischievous intent to constitute a libel. *Ib.*
6. To support an action for a libel, the plaintiff's name need not be mentioned in the writing—it is sufficient that there is a description of him, by which he may be known.—*Clarke vs. Creitzburgh*, 491

LIENS.

See Insolvent Debtor—Interest—Lands.

1. An execution loses its lien on the property of the defendant when his body is taken under a ca. sa.; and if an assignment is made under the prison bounds act, the oldest fi. fa. though it be junior to the execution under which the body is taken, has the first lien.—*Cohen vs. Grier*, 509
2. The other judgment creditors having issued out writs of fi. fa. before they had taken out writs of ca. sa., do not thereby retain their liens. *Ib.*

LIMITATIONS, STATUTE OF

1. Where the plaintiff, an administrator, charges in his declaration a promise to his intestate, and the statute of limitations is pleaded, replication that within four years, defendant promised intestate, and since his death the administrator, demurrer, supported to so much as replied a promise to the administrator, as a departure from the declaration; but new trial granted to plaintiff with leave to add a count, to meet the justice of the case.—*Jamison vs. Lindsay*, 93
2. The replication must not depart from the allegations made in the declaration in any material matter. *Ib.*
3. Motion for nonsuit refused, because the case was proved as stated upon the record, though that was defective. *Ib.*
4. "I have paid the money, but if I cannot shew that I have paid it, I will not plead the statute," is sufficient to take a case out of the statute of limitations. *Ib.*
5. A father, by deed of gift, gave to his daughter a slave "to hold, &c. after his death." Held that the right of property vested immediately in the daughter, and her right barred by the statute of limitations, during the life of the father.—*Ingram vs. Porter*, 198
6. Where a defendant admits an account, but says that there is a discount to a greater amount, it is not such an acknowledgment as takes a case out of the statute of limitations.—*Lee vs. Polk*, 215
7. All objections and pleadings in reply to a discount are ore tenus, and require no previous notice; and a discount barred by the statute of limitations is inadmissible if objected to.—*Turnbull vs. Strohecker*, 210
8. Where plaintiff sues on an account made up of various items, some of them within four years, and the others of longer date, the items charged within four years will not prevent the statute of limitations from running against the other items, where they are only demands by A. against B. in the common way of business, charged from year to year, and not mutual accounts running between two persons. The rule never applies where all the items are on one side. *Ib.*
9. Where an administrator sets up a discount, which is of four years standing, it is no objection to the statute of limitations, that the administrator is allowed nine months to collect the debt, as during the nine months he may sue, though he cannot be sued. *Ib.*
10. The statute of limitations will not commence to run before administration taken out.—*Geiger vs. Brown*, 423

LUNATIC.

See Insanity—Will.

MALICIOUS PROSECUTION.

1. An information before a Magistrate does not constitute such commencement of a prosecution, as to enable the person informed against to maintain an action for malicious prosecution.—*Heyward vs. Cuthbert*, 354

2. The foundation of such an action is the wrong done to the person; and if he is not detained or imprisoned, the action cannot be maintained. The party must have been put in such a situation as to have it in his power to compel the State to proceed or to discharge him. *Ib.*
3. Nor is the entry of *not. pros.* by the Solicitor on the information, such a termination of the matter as would support an action, if the prosecution had been commenced. *Ib.*
4. If the information constitutes a libel, the party informed against must pursue his remedy as for a libel, (and not bring an action on the case,) and in such a case, though it be a judicial proceeding, yet if it be shewn that it was merely resorted to, to gratify private malignity, and to be false, the action for a libel may be maintained. *Ib.*

MASTER IN EQUITY.

See Commissioner in Equity.

MEMBERS OF THE LEGISLATURE.

1. By the constitution of the State, members of the Legislature are privileged from being sued during the sitting of the Legislature, and ten days previous and subsequent thereto.—*Tillinghast & Arthur vs. Carr*, 152
2. The provision of the constitution is not confined to cases of bail processes, but extends to all suits. *Ib.*

MILITIA.

1. The act of assembly exempting certain persons from the performance of "ordinary musters," only exempts them from *Company parades*.—*State vs. Collector*, 30

MORTGAGE.

1. The act of 1791, giving the Court of Common Pleas the power to order the sale of mortgaged premises after judgment, by suggestion, does not apply where the mortgagor is out of possession. In such cases the mortgagee must go into the Court of Equity and make the mortgagor, as well as the party in possession, parties to the foreclosure.—*Durand vs. Isaacs*, 54
2. To obtain the sale of mortgaged property by suggestion in a court of law, the plaintiff must first obtain his judgment but he is not obliged to file his suggestion and move for a sale of the property within six months after rendition of the judgment.—*Trescott & Inglesby vs. M. Laughlin*, 264
3. The defendant must have notice of the suggestion, which may be given to him before the sitting of the court at which judgment is obtained, and then the plaintiff may obtain an order for sale at the same court that he obtains judgment on the bond. *Ib.*
4. But the plaintiff may serve notice of his suggestion and obtain an order for sale at any other sitting of the court, after the judgment on the bond. *Ib.*
5. Where the order of sale is immediately made at the time the judgment is obtained, the sale must take place within six months, but when made at any subsequent period, at any time within six months of the order. *Ib.*

4. By the Statute, a mortgage is a conveyance of land as a security for money to be paid in future, and defeasible upon the payment of the money within the time prescribed. If the money be not paid according to the contract, the deed becomes absolute, and the fee of the land is vested in the mortgagee.—*State vs. Lord*, 336
7. In Equity, however, it is considered in the nature of a pledge, and that Court will interpose its authority, and extend to the mortgagor further time to redeem, although his remedy is lost at law. This is what is called an equity of redemption. 1b.
8. But by our act of 1791, the fee continues in the mortgagor, and the mortgagor is entitled to redeem even after the time stipulated. 1b.
9. Under this act the right to redeem is a legal right, and does not require the aid of the Court of Equity. 1b.
10. A mere equity is not the subject of an execution, and though in England an equity of redemption cannot be levied on, yet here the right of the mortgagor being a legal one, may be levied upon and sold. 1b.
11. The purchaser takes the place of the mortgagor, with all his rights, privileges and disabilities. 1b.
12. If the land be sold under an execution older than the mortgage, the purchaser takes it discharged of the mortgage, and if he purchases under the mortgage, he takes it subject to the judgment. 1b.
13. If land be sold under a junior execution, the purchaser acquires a good title, and the money is applied to the several executions according to their priority. 1b.
14. The execution is considered as a mere authority to sell without regard to the distribution of the fund afterwards. 1b.
15. It seems that judgments and executions, though dormant preserve their liens for any indefinite period of time. 1b.
16. Where a purchaser buys under an execution, there being a prior mortgage, he takes subject to the mortgage, and may redeem. 1b.
17. But where there were prior and subsequent judgments and an intermediate mortgage, and the purchaser bought under a judgment subsequent to the mortgage, on a rule against the sheriff by the owner of the subsequent judgment to shew cause why the money was not paid over to his execution, the Court refused to decide the rights of the parties on a rule, and thought the remedy was in equity; the prior judgment and mortgage creditors to be made parties. 1b.

NECESSARIES.

See Infants.

NUISANCE.

1. In an indictment for erecting or keeping a house, which is a nuisance to the neighborhood, two things only are necessary to be stated:—1st. That from the nature of the establishment it may be an annoyance; and, 2dly. That from its situation it has actually become so.—*State vs. Purse*,

2. A house, which from the purposes for which it is used, or the situation in which it is placed, may not be a nuisance, may become so by negligence in keeping it; when that is the ground for prosecution, it must be so laid in the indictment.

Ib.

ORDINARY.

See. Will—Executor.

1. The decree of the ordinary against a will, is not conclusive against the rights of a devisee of lands, or of one who takes a power to sell lands, or their privies; nor is the finding of the Jury on appeal from the ordinary.—*Crosland vs. Murdock*,
2. The power of the Court of Common Pleas in cases of appeals from the ordinary on questions in relation to the validity of wills, is entirely appellate, though the matter is examined over de novo, and the verdict of the Jury is not more conclusive against a devisee, than the decree of the ordinary. It is but the judgment of the ordinary corrected or affirmed by an appellate tribunal.
3. Where a third person brings suit on an administration bond in the name of the ordinary, endorsing his name on the record, and acknowledging himself liable for costs, the ordinary is a competent witness to prove the bond.—*Price vs. Gregory*,
4. Costs are not allowed on appeals from the ordinary.—*Boulware vs. Pickett*.

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Ib.

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OVERSEERS.

1. Though a contract for overseers wages be to pay a gross sum by the year, the Jury may, when the parties have differed and separated before the end of the year, apportion the damages to the services actually rendered, to effect substantial justice.—*McClure vs. Pyatt*,
2. When a planter without good cause turns away his overseer, at a season of the year when it is impracticable to get employment, and his time is wholly lost, the overseer, ought to recover the whole wages for the year. So if the overseer abandons his employer without cause, or by his neglect causes a loss equal to his services, he is entitled to nothing.—*Byrd vs. Boyd*,
3. But where the planter reaps the whole benefit of the overseers services, and circumstances occur which justify his discharging the overseer, not immediately connected with the contract, the overseer is entitled to compensation, so far as his services were properly directed.
4. A contract for overseer's wages is not an entire contract by the year. If the overseer has been turned off for misconduct, he may, notwithstanding, recover for the time he conducted himself properly.—*Ecken vs. Harrison*,

26

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Ib.

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PAROL GIFT.

1. Upon marriage of a daughter, the mother (the father and husband not being present,) sent a negro woman with her daughter to assist her and to return after a while. But

- the slave is permitted by the father-in-law to remain with the son-in-law upwards of four years as his own property, and was so considered by every one, the father in the mean time making no claim. Held that it amounted to a gift to the son-in-law.—*Byrd vs. Ward*, 228
2. The negro being levied on under executions against the son-in-law and sold, the purchaser obtained a good title. *Ib.*
 3. Though the father may have intended the property for his daughter's sole use, yet after suffering it so long to appear to the world as belonging to his son-in-law, it would be fraudulent to suffer him to convey the property in trust for his daughter, in exclusion of the rights of creditors. *Ib.*
 4. The doctrine that where a parent suffers property to go and remain in the possession of a married child, a parol gift is presumed, applies as well, where the property goes into the possession of the child at marriage as afterwards.—*M'Cluney vs. Lockhart*, 251
 5. It is always a question of fact to be determined under all the circumstances, whether a gift was intended or not. *Ib.*
 6. The presumption is strongest where the property goes into the possession of the child at marriage. *Ib.*

PERJURY.

1. Perjury may be assigned on an oath administered by a justice of the peace, on the investigation of a matter submitted to arbitrators by a rule of court with consent of parties.—*State vs. Stephenson*, 165

PLEADING.

1. Where the tenant holds over his term, and the landlord recovers double rent under the act of 1808, he cannot bring case afterwards against the tenant for holding over, whereby he lost the sale of the premises. Quere? If the plaintiffs under any circumstances could recover for such remote consequential damages?—*Crips vs. Talvande*, 20
2. To determine whether causes of action are the same, the same evidence must be necessary to support them. *Ib.*
3. Where a party has been injured he cannot bring suit for one part and another suit for another part. If the cause of action is entire, but one suit can be brought. *Ib.*
4. The replication must not depart from the allegations made in the declaration in any material matter.—*Jamison vs. Lindsay*, 93
5. Motion for nonsuit refused, because the case was proved as stated upon the record, though that was defective. *Ib.*
6. In debt on bail bond, the plaintiff in his declaration must set out the condition, the proceedings against the principal, and the particular breaches.—*Loker vs. Antonio*, 175
7. It is not enough to set out the condition, the writ, and the return thereof, and to assign as a breach that the defendant did not appear; the plaintiff should allege that he had prosecuted his writ to judgment, and had issued a *ca. sa.* to which there had been a return of non inventus, and that the defendant in the original action had not paid the debt, costs and charges, or any part, nor rendered his body. *Ib.*

8. A judgment confessed on an insimul computassent, is good, though the debt due was on specialties.—*Hall vs. Mooreman*, 283
9. The defendant by an instrument purporting to be articles of agreement between himself and the plaintiff, but signed and sealed by the defendant alone, obligated himself to build a house for the plaintiff by a certain day, and acknowledged payment, and on failure to build the house within the time mentioned; defendant to forfeit \$1200 to the plaintiff. Plaintiff brought his action of debt for the penalty. Held on demurrer that the plaintiff should have averred that the defendant had neither built the house nor paid the \$1200. The declaration containing no such averment, the plaintiff had no cause of action.—*Salmon vs. Jenkins*, 298
10. If a contract be in the disjunctive, the breach ought to be assigned as to both alternatives. *Ib.*
14. Until there is a breach of both alternatives, there is no cause of action, *Ib.*
12. Where the penalty professes to be a subsisting debt and the condition is added only by way of defeasance, the party may sue for the penalty, without noticing the condition; but it is otherwise where there is no subsisting debt or duty, and the obligation depends on the performance or non performance of some particular act. *Ib.*
13. If there is a contingency, it must be alleged to have happened. *Ib.*
14. Every valid contract must have a good or valuable consideration, and when set out in pleading either as the foundation of an action or by way of defence it must appear on record.—*Corbett vs. Lucas & Dotterer*, 323
15. There can be no such thing as a release after contract broken, except by deed, and it must be so pleaded. *Ib.*
16. A party may bind himself by parol to release; but it must be on sufficient consideration, and although such a contract may furnish sufficient ground of defence, as payment, accord and satisfaction, &c. yet technically it is not a release. *Ib.*
17. If the release is under seal, it implies a consideration, otherwise if not under seal, and the consideration must be proved. *Ib.*
18. The plea of nil debet to debt on bond is irregular, but is a substantial plea; and if the plaintiff choose to go to trial on such an issue, he must be bound by the result; and the sum found by the Jury will be presumed to be the amount actually due.—*Belser vs. Irvine*, 380
19. Either party, in an action of debt on bond, may submit the condition to the Jury, and where on the plea of nil debet the Jury have found a verdict for ten cents, the Court will not after a lapse of ten years, interfere with the verdict, though an error might possibly have been committed. *Ib.*

POWER OF ATTORNEY.

See Attorney.

PRACTICE.

1. A judgment confessed on an insimul computassent is good, though the debt due was on specialties.—*Hall vs. Mooreman*, 283
2. After a case has been three years on the issue docket, the defendant will not be permitted to withdraw the general issue to plead he unques executor.—*Warner vs. Condy & Raguet*, 344
3. If an executor makes proferit in his declaration and the defendant pleads to the action, he admits the plaintiff to be properly in Court. The letters are then taken out of Court, and the defendant cannot call for them again. *Ib.*
4. When the sheriff returns that he has left the copy of a writ at the most usual and notorious place of abode, the defendant may, on a motion to set aside the judgment, prove that it was not his place of abode.—*Wotten vs. Parsons*, 368
5. A motion to set aside a judgment on the ground that the original process was left at the wrong place, must be made at the sitting of the Circuit Court; but a Judge at Chambers may suspend an execution until the Court sits. *Ib.*
6. Every ground of appeal ought to be so distinctly stated, that the Court may at once see the point which it is called upon to decide, otherwise the Court does not feel itself bound to decide any question raised under such indefinite specifications.—*Blake vs. De Liesseline*, 496

PRISON BOUNDS.

See Insolvent Debtor.

1. In an action against the sheriff for an escape of a person from the goal bounds, the plaintiff is not bound to prove the insolvency of the sureties to the prison bounds bond.—*Yates vs. Yeaden*. 18
2. The sheriff alone can sue on the bond, and the Court at its discretion may stay the proceedings against the sheriff until he can recover on the bond. *Ib.*
3. The sheriff can re-take the prisoner, and put him into close confinement. *Ib.*
4. The 7th section of the prison bounds' act, which declares that no prisoner shall be discharged "who shall have within three months before his or her confinement, or at any time since, paid or assigned his estate, or any part thereof, to one creditor in preference to another, or fraudulently sold, conveyed, or assigned his estate to defraud his creditors," &c. applies as well to persons applying for the insolvent debtor's act, as to applicants under the prison bounds' act.—*Dobson vs. Teasdale*, 81
5. But the mere fact of paying a debt due to one creditor within the three months, will not of itself exclude the debtor from the benefit of the act, but such payment must be made with a view to a fraudulent or undue preference of one creditor over the rest. *Ib.*
6. Although the sheriff may, in an action on the case against him for an escape, prove the insolvency of the defendant to reduce the damages, yet he must also shew

some other circumstance in excuse or mitigation, or the Jury must give damages to the amount of the whole debt.—

Jones vs. Blair,

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7. But in an action on the case against the sheriff for taking insolvent sureties to a prison bounds bond, where the defendant was committed under a ca. sa. the solvency of the defendant cannot be enquired into, as the only measure of damages is the amount due on the execution, under which the defendant took the bounds. *Ib.*
8. A. took the benefit of the prison bounds act, and refused to include in his assignment a horse, and pending an appeal as to the exemption of the horse, A. sold it to the defendant. The Court of Appeals decided that the horse was not exempt, and the plaintiff now brought suit against the defendant for the horse, held that the sale was good against the claim of the plaintiff.—*Krebs vs. Miller,* 406
9. The assignment under the act has no retrospective operation, *Ib.*
10. Where a defendant is in the prison bounds under ca. sa. and he is discharged by the plaintiff, it releases the surety to the prison bounds.—*Walton vs. Oswald,* 591
11. The discharge to release the surety need not be in writing *Ib.*
12. A direction from the plaintiff, by his agent, to the sheriff to stay proceedings against the defendant, who is in the prison bounds, is a sufficient authority to the sheriff to discharge the defendant. *Ib.*
13. An execution loses its lien on the property of the defendant when his body is taken under a ca. sa. and if an assignment is made under the prison bounds act, the oldest fi. fa. though it be junior to the execution under which the body is taken, has the first lien.—*Cohen vs. Grier,* 509
14. The other judgment creditors having issued out writs of fi. fa. before they had taken out writs of ca. sa. do not thereby retain their liens. *Ib.*

PROBATE.

See Will—Executor.

PROHIBITION.

1. Prohibition will not lie against the Governor to restrain him from granting a commission to an officer who has been improperly elected.—*Grier vs. Gov. Taylor,* 206

PROMISSORY NOTES.

See Bills of Exchange.

PROTEST.

See Bills of Exchange.

RECEIVER OF STOLEN GOODS.

1. A slave can commit a felony.—*State vs. Wright,* 358
2. By statute of William and Mary, receivers of stolen goods are made accessories after the fact. Since which statute no indictment as for a misdemeanor at common law can be maintained. *Ib.*

3. So the receiver of stolen goods from a slave cannot be indicted for a misdemeanour, (except under the statute, 1 Ann, c. 9,) but under the statute he may be indicted as an accessory, and the record of conviction of the slave may be given in evidence. *Ib.*
4. Quere—In what manner is it to be ascertained on the trial, that the slave was convicted of grand or petit larceny? *Ib.*

RENT.

See Distress.

RESCOUS.

See Landlord and Tenant.

RETAILING WITHOUT A LICENSE.

1. A conviction and fine, for retailing liquors without a license, does not operate as a license to retail for a year.—*State vs. M^r Bride,* 332
2. When the offence charged includes in its nature a succession or continuation of acts, which do not necessarily belong to any particular period, as public nuisances, &c. the indictment may so charge it, and any fact going to establish it, anterior to the finding of the bill, may be given in evidence, and a conviction would be a bar to another prosecution for any such act committed before the finding of the bill in the first indictment. *Ib.*
3. So, if a person is convicted of retailing without a license such a conviction will be a bar to another prosecution for retailing at any time anterior to the finding of the bill in the first indictment. *Ib.*
4. To retail or open a tavern for one day without a license completes the offence, and if it continues for a month or a year, it is no more, because the offence is in its nature continuous. *Ib.*
5. A single act of retailing may furnish a presumption of the consummation of the offence; but the proof of it would be more conclusive, if it consisted of a continuation and succession of acts, giving a decided character to the transaction. The idea of continuity is inseparable from it. *Ib.*
6. Where a person is sued by the City Council of Charleston, for the penalty for retailing without a license in the city of Charleston, the Recorder has jurisdiction of the case if the offence is committed within the City, whether the defendant resides in the city or not.—*City Council vs. King,* 487
7. By the act of 1823, the penalty must be sued for by the City Council, and a *qui tam* is not necessary. *Ib.*
8. Where a person is in the habit of using only initials for his christian name, and was so indicted, and was proved that he was so known and called himself, and the fact whether he was so known is put in issue and the Jury convicts him, the Court will not interfere on that ground. *Ib.*
9. A man may take whatever name he pleases, and if he by his own conduct renders it doubtful what his real name is, the fault is his, and he must take the consequences. *Ib.*
10. In the suit by the City Council for the penalty for retailing, a citizen of the town, though one of the corporators, is a competent witness. *Ib.*

ROADS.

See Commissioners of the Roads.

SALES.

1. The concealment of a circumstance, which materially impairs the value of an article sold, is fraudulent, and though the vendor at the time of sale refused to warrant the soundness, yet the vendee may recover in an action of deceit.—*Hough vs. Evans*, 169

SEAL.

See Contract.

1. It is not necessary that a seal should be made of wax.—The impression and not the wax makes the seal.—*Relph & Co. vs. Gist*, 267
2. Whether the impression was intended for a seal, is always a question of fact for the Jury, whether made of wax, ink, or otherwise, *Ib.*
3. If the body of the instrument does not shew the intention to make a scrawl a seal, it may be shewn from the scrawl itself, or by evidence aliunde. *Ib.*
4. As where the L. S. are enclosed with the scrawl, proof that the letters are in the hand-writing of the obligor. *Ib.*
5. Or where a person uses a symbol or cypher, that it has usually been employed for the purpose of a seal and no other. *Ib.*
6. Parol evidence is admissible to prove that the party intended the scrawl for his seal. *Ib.*

SERVITUDE.

1. Every privilege which one man claims in derogation of the rights of another, is viewed with jealousy by the law, and it will require it to be confined to the prescribed limits and specific objects of the grant.—*Taylor vs. Hampton*, 96
2. When a person claims the right of keeping up a pond of water, which overflows the land of another, it must be kept at its prescribed limits, which are the height to which it was kept at the time of the purchase, and for the specific object to which it was then applied. *Ib.*
3. By the extinguishment of a right is meant its total annihilation, and not its suspension. *Ib.*
4. The right to overflow the lands of another by grant or prescription, is an incorporeal hereditament, and if extinguished for a moment is gone forever. *Ib.*
5. Rights of this sort are denominated by the civil law *servitudes*. *Ib.*
6. A servitude may be extinguished by the act of God, the operation of law, or by the act of the party. *Ib.*
7. The act of a party shall always be construed most strongly against himself. *Ib.*
8. A servitude may be extinguished by a renunciation of the party, either *express* or *implied*, as by permitting the party from whom the servitude is due, to build on the property such works as presuppose an abandonment of the right. *Ib.*

6. By the English law, a mortgage is a conveyance of land as a security for money to be paid in future, and defeasable upon the payment of the money within the time prescribed. If the money be not paid according to the contract, the deed becomes absolute, and the fee of the land is vested in the mortgagee.—*State vs. Laval*, 336
7. In Equity, however, it is considered in the nature of a pledge, and that Court will interpose its authority, and extend to the mortgagor further time to redeem, although his remedy is lost at law. This is what is called an equity of redemption. *Ib.*
8. But by our act of 1791, the fee continues in the mortgagor, and the mortgagor is entitled to redeem even after the time stipulated. *Ib.*
9. Under this act the right to redeem is a legal right, and does not require the aid of the Court of Equity. *Ib.*
10. A mere equity is not the subject of an execution, and though in England an equity of redemption cannot be levied on, yet here the right of the mortgagor being a legal one, may be levied upon and sold. *Ib.*
11. The purchaser takes the place of the mortgagor, with all his rights, privileges and disabilities. *Ib.*
12. If the land be sold under an execution older than the mortgage, the purchaser takes it discharged of the mortgage, and if he purchases under the mortgage, he takes it subject to the judgment. *Ib.*
13. If land be sold under a junior execution, the purchaser acquires a good title, and the money is applied to the several executions according to their priority. *Ib.*
14. The execution is considered as a mere authority to sell without regard to the distribution of the fund afterwards. *Ib.*
15. It seems that judgments and executions, though dormant preserve their liens for any indefinite period of time. *Ib.*
16. Where a purchaser buys under an execution, there being a prior mortgage, he takes subject to the mortgage, and may redeem. *Ib.*
17. But where there were prior and subsequent judgments and an intermediate mortgage, and the purchaser bought under a judgment subsequent to the mortgage, on a rule against the sheriff by the owner of the subsequent judgment to shew cause why the money was not paid over to his execution, the Court refused to decide the rights of the parties on a rule, and thought the remedy was in equity; the prior judgment and mortgage creditors to be made parties. *Ib.*

NECESSARIES.

See Infants.

NUISANCE.

1. In an indictment for erecting or keeping a house, which is a nuisance to the neighborhood, two things only are necessary to be stated:—1st. That from the nature of the establishment it may be an annoyance; and, 2dly. That from its situation it has actually become so.—*State vs. Purse*,

2. A house, which from the purposes for which it is used, or the situation in which it is placed, may not be a nuisance, may become so by negligence in keeping it; when that is the ground for prosecution, it must be so laid in the indictment.

Ib.

ORDINARY.

See Will—Executor.

1. The decree of the ordinary against a will, is not conclusive against the rights of a devisee of lands, or of one who takes a power to sell lands, or their privies; nor is the finding of the Jury on appeal from the ordinary.—*Crosland vs. Murdock*, 217
2. The power of the Court of Common Pleas in cases of appeals from the ordinary on questions in relation to the validity of wills, is entirely appellate, though the matter is examined over de novo, and the verdict of the Jury is not more conclusive against a devisee, than the decree of the ordinary. It is but the judgment of the ordinary corrected or affirmed by an appellate tribunal. *Ib.*
3. Where a third person brings suit on an administration bond in the name of the ordinary, endorsing his name on the record, and acknowledging himself liable for costs, the ordinary is a competent witness to prove the bond.—*Price vs. Gregory*, 261
4. Costs are not allowed on appeals from the ordinary.—*Boulcare vs. Pickett*, 275

OVERSEERS.

1. Though a contract for overseers wages be to pay a gross sum by the year, the Jury may, when the parties have differed and separated before the end of the year, apportion the damages to the services actually rendered, to effect substantial justice.—*M'Clure vs. Pyatt*, 26
2. When a planter without good cause turns away his overseer, at a season of the year when it is impracticable to get employment, and his time is wholly lost, the overseer, ought to recover the whole wages for the year. So if the overseer abandons his employer without cause, or by his neglect causes a loss equal to his services, he is entitled to nothing.—*Byrd vs. Boyd*, 246
3. But where the planter reaps the whole benefit of the overseers services, and circumstances occur which justify his discharging the overseer, not immediately connected with the contract, the overseer is entitled to compensation, so far as his services were properly directed. *Ib.*
4. A contract for overseer's wages is not an entire contract by the year. If the overseer has been turned off for misconduct, he may, notwithstanding, recover for the time he conducted himself properly.—*Ecken vs. Harrison*, 249

PAROL GIFT.

1. Upon marriage of a daughter, the mother (the father and husband not being present,) sent a negro woman with her daughter to assist her and to return after a while. But

the slave is permitted by the father-in-law to remain with the son-in-law upwards of four years as his own property, and was so considered by every one, the father in the mean time making no claim. Held that it amounted to a gift to the son-in-law.—*Byrd vs. Ward*, 228

2. The negro being levied on under executions against the son-in-law and sold, the purchaser obtained a good title. *Ib.*
3. Though the father may have intended the property for his daughter's sole use, yet after suffering it so long to appear to the world as belonging to his son-in-law, it would be fraudulent to suffer him to convey the property in trust for his daughter, in exclusion of the rights of creditors. *Ib.*
4. The doctrine that where a parent suffers property to go and remain in the possession of a married child, a parol gift is presumed, applies as well, where the property goes into the possession of the child at marriage as afterwards.—*M^r Cluney vs. Lockhart*, 251
5. It is always a question of fact to be determined under all the circumstances, whether a gift was intended or not. *Ib.*
6. The presumption is strongest where the property goes into the possession of the child at marriage. *Ib.*

PERJURY.

1. Perjury may be assigned on an oath administered by a justice of the peace, on the investigation of a matter submitted to arbitrators by a rule of court with consent of parties.—*State vs. Stephenson*, 165

PLEADING.

1. Where the tenant holds over his term, and the landlord recovers double rent under the act of 1808, he cannot bring case afterwards against the tenant for holding over, whereby he lost the sale of the premises. *Quere* ? If the plaintiffs under any circumstances could recover for such remote consequential damages ?—*Crips vs. Takwande*, 20
2. To determine whether causes of action are the same, the same evidence must be necessary to support them. *Ib.*
3. Where a party has been injured he cannot bring suit for one part and another suit for another part. If the cause of action is entire, but one suit can be brought. *Ib.*
4. The replication must not depart from the allegations made in the declaration in any material matter.—*Jamison vs. Lindsay*, 93
5. Motion for nonsuit refused, because the case was proved as stated upon the record, though that was defective. *Ib.*
6. In debt on bail bond, the plaintiff in his declaration must set out the condition, the proceedings against the principal, and the particular breaches.—*Loker vs. Antonio*, 175
7. It is not enough to set out the condition, the writ, and the return thereof, and to assign as a breach that the defendant did not appear; the plaintiff should allege that he had prosecuted his writ to judgment, and had issued a *ca. sa.* to which there had been a return of *non inventus*, and that the defendant in the original action had not paid the debt, costs and charges, or any part, nor rendered his body. *Ib.*

8. A judgment confessed on an insimul computassent, is good, though the debt due was on specialties.—*Hall vs. Mooreman*, 283
9. The defendant by an instrument purporting to be articles of agreement between himself and the plaintiff, but signed and sealed by the defendant alone, obligated himself to build a house for the plaintiff by a certain day, and acknowledged payment, and on failure to build the house within the time mentioned; defendant to forfeit \$1200 to the plaintiff. Plaintiff brought his action of debt for the penalty. Held on demurrer that the plaintiff should have averred that the defendant had neither built the house nor paid the \$1200. The declaration containing no such averment, the plaintiff had no cause of action.—*Salmon vs. Jenkins*, 288
10. If a contract be in the disjunctive, the breach ought to be assigned as to both alternatives. *Ib.*
14. Until there is a breach of both alternatives, there is no cause of action, *Ib.*
12. Where the penalty professes to be a subsisting debt and the condition is added only by way of defeasance, the party may sue for the penalty, without noticing the condition; but it is otherwise where there is no subsisting debt or duty, and the obligation depends on the performance or non performance of some particular act. *Ib.*
13. If there is a contingency, it must be alleged to have happened. *Ib.*
14. Every valid contract must have a good or valuable consideration, and when set out in pleading either as the foundation of an action or by way of defence it must appear on record.—*Corbett vs. Lucas & Dotterer*, 323
15. There can be no such thing as a release after contract broken, except by deed, and it must be so pleaded. *Ib.*
16. A party may bind himself by parol to release; but it must be on sufficient consideration, and although such a contract may furnish sufficient ground of defence, as payment, accord and satisfaction, &c. yet technically it is not a release. *Ib.*
17. If the release is under seal, it implies a consideration, otherwise if not under seal, and the consideration must be proved. *Ib.*
18. The plea of nil debet to debt on bond is irregular, but is a substantial plea; and if the plaintiff choose to go to trial on such an issue, he must be bound by the result; and the sum found by the Jury will be presumed to be the amount actually due.—*Belser vs. Irvine*, 380
19. Either party, in an action of debt on bond, may submit the condition to the Jury, and where on the plea of nil debet the Jury have found a verdict for ten cents, the Court will not after a lapse of ten years, interfere with the verdict, though an error might possibly have been committed. *Ib.*

POWER OF ATTORNEY.

See Attorney.

PRACTICE.

1. A judgment confessed on an insimul computassent is good, though the debt due was on specialties.—*Hall vs. Mooreman*, 283
2. After a case has been three years on the issue docket, the defendant will not be permitted to withdraw the general issue to plead he unques executor.—*Warner vs. Condy & Raguet*, 344
3. If an executor makes profert in his declaration and the defendant pleads to the action, he admits the plaintiff to be properly in Court. The letters are then taken out of Court, and the defendant cannot call for them again. *Ib.*
4. When the sheriff returns that he has left the copy of a writ at the most usual and notorious place of abode, the defendant may, on a motion to set aside the judgment, prove that it was not his place of abode.—*Wolten vs. Parsons*, 368
5. A motion to set aside a judgment on the ground that the original process was left at the wrong place, must be made at the sitting of the Circuit Court; but a Judge at Chambers may suspend an execution until the Court sits. *Ib.*
6. Every ground of appeal ought to be so distinctly stated, that the Court may at once see the point which it is called upon to decide, otherwise the Court does not feel itself bound to decide any question raised under such indefinite specifications.—*Blake vs. De Liesseline*, 496

PRISON BOUNDS.

See Insolvent Debtor.

1. In an action against the sheriff for an escape of a person from the goal bounds, the plaintiff is not bound to prove the insolvency of the sureties to the prison bounds bond.—*Yates vs. Yeaden*. 18
2. The sheriff alone can sue on the bond, and the Court at its discretion may stay the proceedings against the sheriff until he can recover on the bond. *Ib.*
3. The sheriff can re-take the prisoner, and put him into close confinement. *Ib.*
4. The 7th section of the prison bounds' act, which declares that no prisoner shall be discharged "who shall have within three months before his or her confinement, or at any time since, paid or assigned his estate; or any part thereof, to one creditor in preference to another, or fraudulently sold, conveyed, or assigned his estate to defraud his creditors," &c. applies as well to persons applying for the insolvent debtor's act, as to applicants under the prison bounds' act.—*Dobson vs. Teasdale*, 81
5. But the mere fact of paying a debt due to one creditor within the three months, will not of itself exclude the debtor from the benefit of the act, but such payment must be made with a view to a fraudulent or undue preference of one creditor over the rest. *Ib.*
6. Although the sheriff may, in an action on the case against him for an escape, prove the insolvency of the defendant to reduce the damages, yet he must also shew

some other circumstance in excuse or mitigation, or the Jury must give damages to the amount of the whole debt.—

Jones vs. Blair,

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7. But in an action on the case against the sheriff for taking insolvent sureties to a prison bounds bond, where the defendant was committed under a ca. sa. the solvency of the defendant cannot be enquired into, as the only measure of damages is the amount due on the execution, under which the defendant took the bounds.

Ib.

8. A. took the benefit of the prison bounds act, and refused to include in his assignment a horse, and pending an appeal as to the exemption of the horse, A. sold it to the defendant. The Court of Appeals decided that the horse was not exempt, and the plaintiff now brought suit against the defendant for the horse, held that the sale was good against the claim of the plaintiff.—*Krebbs vs. Miller,*

406

9. The assignment under the act has no retrospective operation,

Ib.

10. Where a defendant is in the prison bounds under ca. sa. and he is discharged by the plaintiff, it releases the surety to the prison bounds.—*Walton vs. Oswald,*

581

11. The discharge to release the surety need not be in writing

Ib.

12. A direction from the plaintiff, by his agent, to the sheriff to stay proceedings against the defendant, who is in the prison bounds, is a sufficient authority to the sheriff to discharge the defendant.

Ib.

13. An execution loses its lien on the property of the defendant when his body is taken under a ca. sa. and if an assignment is made under the prison bounds act, the oldest fi. fa. though it be junior to the execution under which the body is taken, has the first lien.—*Cohen vs. Grier,*

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14. The other judgment creditors having issued out writs of fi. fa. before they had taken out writs of ca. sa. do not thereby retain their liens.

Ib.

PROBATE.

See Will—Executor.

PROHIBITION.

1. Prohibition will not lie against the Governor to restrain him from granting a commission to an officer who has been improperly elected.—*Grier vs. Gov. Taylor,*

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PROMISSORY NOTES.

See Bills of Exchange.

PROTEST.

See Bills of Exchange.

RECEIVER OF STOLEN GOODS.

1. A slave can commit a felony.—*State vs. Wright,*
2. By statute of William and Mary, receivers of stolen goods are made accessories after the fact. Since which statute no indictment as for a misdemeanor at common law can be maintained.

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Ib.

3. So the receiver of stolen goods from a slave cannot be indicted for a misdemeanour, (except under the statute, 1 Ann, c. 9.) but under the statute he may be indicted as an accessory, and the record of conviction of the slave may be given in evidence. *Ib.*
4. Quere—In what manner is it to be ascertained on the trial, that the slave was convicted of grand or petit larceny? *Ib.*

RENT.

See Distress.

RESCOUS.

See Landlord and Tenant.

RETAILING WITHOUT A LICENSE.

1. A conviction and fine, for retailing liquors without a license, does not operate as a license to retail for a year.—*State vs. M^r Bride*, 332
2. When the offence charged includes in its nature a succession or continuation of acts, which do not necessarily belong to any particular period, as public nuisances, &c. the indictment may so charge it, and any fact going to establish it, anterior to the finding of the bill, may be given in evidence, and a conviction would be a bar to another prosecution for any such act committed before the finding of the bill in the first indictment. *Ib.*
3. So, if a person is convicted of retailing without a license such a conviction will be a bar to another prosecution for retailing at any time anterior to the finding of the bill in the first indictment. *Ib.*
4. To retail or open a tavern for one day without a license completes the offence, and if it continues for a month or a year, it is no more, because the offence is in its nature continuous. *Ib.*
5. A single act of retailing may furnish a presumption of the consummation of the offence; but the proof of it would be more conclusive, if it consisted of a continuation and succession of acts, giving a decided character to the transaction. The idea of continuity is inseparable from it. *Ib.*
6. Where a person is sued by the City Council of Charleston, for the penalty for retailing without a license in the city of Charleston, the Recorder has jurisdiction of the case if the offence is committed within the City, whether the defendant resides in the city or not.—*City Council vs. King*, 487
7. By the act of 1823, the penalty must be sued for by the City Council, and a *qui tam* is not necessary. *Ib.*
8. Where a person is in the habit of using only initials for his christian name, and was so indicted, and was proved that he was so known and called himself, and the fact whether he was so known is put in issue and the Jury convicts him, the Court will not interfere on that ground. *Ib.*
9. A man may take whatever name he pleases, and if he by his own conduct renders it doubtful what his real name is, the fault is his, and he must take the consequences. *Ib.*
10. In the suit by the City Council for the penalty for retailing, a citizen of the town, though one of the corporators, is a competent witness. *Ib.*

ROADS.

See Commissioners of the Roads.

SALES.

1. The concealment of a circumstance, which materially impairs the value of an article sold, is fraudulent, and though the vendor at the time of sale refused to warrant the soundness, yet the vendee may recover in an action of deceit.—*Hough vs. Evans*, 169

SEAL.

See Contract.

1. It is not necessary that a seal should be made of wax.—The impression and not the wax makes the seal.—*Ralph & Co. vs. Gist*, 267
2. Whether the impression was intended for a seal, is always a question of fact for the Jury, whether made of wax, ink, or otherwise, *Ib.*
3. If the body of the instrument does not shew the intention to make a scrawl a seal, it may be shewn from the scrawl itself, or by evidence aliunde. *Ib.*
4. As where the L. S. are enclosed with the scrawl, proof that the letters are in the hand-writing of the obligor. *Ib.*
5. Or where a person uses a symbol or cypher, that it has usually been employed for the purpose of a seal and no other. *Ib.*
6. Parol evidence is admissible to prove that the party intended the scrawl for his seal. *Ib.*

SERVITUDE.

1. Every privilege which one man claims in derogation of the rights of another, is viewed with jealousy by the law, and it will require it to be confined to the prescribed limits and specific objects of the grant.—*Taylor vs. Hampton*, 96
2. When a person claims the right of keeping up a pond of water, which overflows the land of another, it must be kept at its prescribed limits, which are the height to which it was kept at the time of the purchase, and for the specific object to which it was then applied. *Ib.*
3. By the extinguishment of a right is meant its total annihilation, and not its suspension. *Ib.*
4. The right to overflow the lands of another by grant or prescription, is an incorporeal hereditament, and if extinguished for a moment is gone forever. *Ib.*
5. Rights of this sort are denominated by the civil law *servitudes*. *Ib.*
6. A servitude may be extinguished by the act of God, the operation of law, or by the act of the party. *Ib.*
7. The act of a party shall always be construed most strongly against himself. *Ib.*
8. A servitude may be extinguished by a renunciation of the party, either *express* or *implied*, as by permitting the party from whom the servitude is due, to build on the property such works as presuppose an abandonment of the right. *Ib.*

9. When the act which prevents the servitude, is by the party to whom the servitude is due, it is wholly extinguished; but when it is by the act of another, it is only suspended. *Ib.*
10. An act incompatible with the nature or exercise of the servitude is sufficient to extinguish it: so the creation of a new inconsistent right by the party himself, will extinguish the former right. *Ib.*

SHERIFF

1. The City Sheriff of Charleston does not hold his office under the constitutional provision of the State, as to the tenure of office of State Sheriffs.—*Laval vs. De Liessline*, 68
2. Where a defendant is in gaol under a ca. sa. and escapes, the plaintiff has two remedies against the sheriff, i. e. An action of *debt*, wherein he will be entitled to recover the whole amount of his judgment against the prisoner; or an *action on the case* for damages by reason of the escape, in which the Jury will be allowed to assess damages according to the circumstances.—*Boyce vs. Barksdale*, 141
3. To an action on the case the sheriff may prove that the defendant was insolvent, in mitigation of damages. *Ib.*
4. Quere.—If the sheriff is liable at all events for an escape (there being no negligence) of a prisoner under final process, as in England? *Ib.*
5. The sheriff is not liable for money received by his deputy, on a case in which execution has not yet been lodged in his office.—*Chiles vs. Holloway*, 164
6. Bail bonds are given to the sheriff and his successor, and may be assigned by the successor.—*Loker vs. Antonio*, 175
7. An attachment for contempt in not paying over money on an execution, or for not collecting it, is in effect a civil proceeding, by which Courts compel their officers to indemnify suitors for losses sustained by neglect of duty.—*Daniel vs. Capers*, 237
8. If the party elects to proceed by attachment and receives the principal of the debt, he cannot afterwards bring an action against the sheriff for damages for the detention. *Ib.*
9. As a condition to his discharge from an attachment, the Court may add that the sheriff should pay interest on the money during the period of the detention; but not having done so the plaintiff cannot bring suit to recover interest by way of damages. *Ib.*
10. Although the sheriff may, in an action on the case against him for an escape, prove the insolvency of the defendant to reduce the damages, yet he must also shew some other circumstance in excuse or mitigation, or the Jury must give damages to the amount of the whole debt.—*Jones vs. Blair*, 281
11. But in an action on the case against the sheriff for taking insolvent sureties to a prison bounds bond, where the defendant was committed under a ca. sa. the solvency of the defendant cannot be enquired into, as the only measure of damages is the amount due on the execution, under which the defendant took the bounds. *Ib.*

12. In an action against the sheriff for an escape under mesne process, evidence that the plaintiff in the original suit, after the escape, suffered a nonsuit, is not conclusive evidence that he has sustained no injury.--*Baker vs. De Liesseline*, 372
13. After an escape the plaintiff may proceed against the sheriff, immediately, without further prosecuting his suit against the principal; but if he do, and abandons it, or is nonsuited, that nonsuit is not *conclusive* in favour of the sheriff. *Ib.*
14. Where a defendant is in custody on mesne process, and the plaintiff is nonsuited, the sheriff may discharge the defendant. *Ib.*

SLAVES.

See Parol Gift.

1. Where a person who hires a slave sends for a physician to attend him while sick, the person so employing the doctor, and not the owner of the slave, is liable to the physician.--*Wells vs. Kennerly*, 123
2. From the nature of the bailment the obligation is imposed on the person hiring the slave. *Ib.*
3. The defendant shot the plaintiff's slave while he was stealing potatoes from a bank at night, and killed him.--The Court held the defendant liable for the value of the negro, and granted a new trial, the Jury having found a verdict for one dollar.--*Richardson vs. Dukes*, 156
4. In assessing damages where property is in question, the value of the article, as nearly as it can be ascertained, furnishes a rule from which the Jury are not at liberty to depart, *Ib.*
5. To excuse a trespass on the ground of accident, it must appear to have occurred without the least fault on the part of the defendant.--*Jennings vs. Fundeburg*, 161
6. Where defendant was in pursuit of runaway negroes who ran from him, and he fired his gun towards them, intending to shoot over their heads, to induce them to stop, and one of the negroes was killed by a random shot, the Court held the owner of the slave was entitled to recover his value, as the accident did not occur without fault on the part of the defendant. *Ib.*
7. Plaintiff's slaves were drowned by an accident happening to defendant's steam-boat, he being a common carrier, and the slaves being passengers. Plaintiff brought suit for damages. The Judge charged the Jury that defendant was liable for the loss of the slaves in the same manner as he would be liable for the loss of goods. Verdict set aside for misdirection.--*McDonald vs. Clark*, 223
8. There is a distinction between the liability of a carrier with respect to the transportation of a slave and a bale of goods. *Ib.*
9. The question should have been submitted to the Jury, whether the accident happened, by the negligence of the carrier, or the act of the slave, or by unavoidable accident. *Ib.*

STATUTE OF LIMITATIONS.

See Limitations, &c.

SURETIES.

See Executor and Administrator---Guardian---Prison Bounds.

1. Where the principal to a bond has been sued, and his body taken with a ca. sa. and discharged with his consent under the provisions of the act of 1815, it does not release the sureties.—*Treasurers vs. Johnson*, 458

TRESPASS.

1. To excuse a trespass on the ground of accident, it must appear to have occurred without the least fault on the part of the defendant.—*Jennings vs. Funderburg*, 161
2. Where the defendant was in pursuit of runaway negroes who ran from him, and he fired his gun towards them, intending to shoot over their heads to induce them to stop, and one of the negroes was killed by a random shot, the court held the owner of the slave was entitled to recover his value, as the accident did not occur without fault on the part of the defendant. *Ib.*

TRESPASS TO TRY TITLES.

1. Where several joint tenants, tenants in coparcenary, &c. bring a joint action of trespass to try titles, and pending the suit one of them die, the action does not abate, as to those who survive.—*Boyleston vs. Cordes*, 144
2. By the act of 1746, if there be two or more plaintiffs or defendants and one or more of them die, if the cause of action survive to the surviving plaintiff or against the surviving defendants, the action shall not abate; but the death being suggested on the record, the suit may proceed for or against the survivors. *Ib.*
3. The plaintiffs suing for the whole may recover such part of the lands as they prove a title to. *Ib.*
4. The 83d rule of court which requires a defendant in an action of trespass to try titles, to set out his title specially if he intends to claim, has become obsolete.—*Judge vs. Cloud*, 235
5. Where a tract of land was sold by the sheriff under an execution against the defendant, in an action of trespass to try titles, by the purchaser against the defendant, the defendant will not be permitted to give evidence that the title of the land was not in himself, but in another whose tenant he was.—*O'Neal vs. Duncan*, 246
6. The sheriff's title, (being the organ of the law to convey the defendant's right,) is considered as the deed of the defendant, and operates as an estoppel. *Ib.*
7. A person having a title to lands, never having been in possession, may convey them without first making an entry. The common law on that subject, and the statute of Henry was not of force in this State, though the statute is enumerated among the British statutes of force. From the earliest times in this State, where one has a good title to lands, he might convey them to a stranger, or commence an action against any one in possession, without

- entry by himself, or any previous possession by his ancestor, or even having received rent.—*Sims vs. De Graf-fenreid*, 253
8. The declarations of a party in favor of his own title is admissible evidence, where they form a part of the res gestæ.—*Martin vs. Simpson*, 262
9. A person cannot set up a title under a grantee who was dead at the time the grant was taken out, as there was no one in esse in whom it could vest.—*Smith vs. Smith*, 276
10. An instrument to convey a freehold must be under seal.—*Cline vs. Black*, 431

TRUST.

See Uses and Trusts.

TRUSTEE.

1. A suit at law cannot be maintained on the bond of a guardian or committee of a lunatic, unless the guardian has accounted, or a specific sum is ascertained to be due.—*James vs. Wallace*, 121
2. The chancellor's ordering the bond to be sued at law, can give no jurisdiction. *Ib.*
3. Where guardians and Trustees fail to make their annual returns as required by the act of Assembly, they must be proceeded against in equity, and not at law. *Ib.*

USES AND TRUSTS.

1. When by deed a use is limited to a person, an alien for life, with a power of appointment, and in case of failure of appointment to her right heirs—held, that she having made an appointment and died, before office found, the estate in the hands of the appointees, citizens, was not subject to escheat, office not having been found during her life time.—*Escheator vs. Smith*, 452
2. Whether a use is vested or not, under the statute of uses, depends entirely on the intention of the grantor. If the trustee is simply to hold, for the use of the cestuique use, then the statute transfers the use into possession; but where it is necessary to the execution of the trust, that the legal estate should remain in the trustee, then the use is not executed—as where lands are devised to trustees for the use of a married woman, in trust to pay the rents and profits to her, or to permit her to take the rents and profits, &c. *Ib.*
3. So where lands were conveyed to a trustee, in trust for the sole and separate use of a feme covert—held, that the use was not executed under the statute. *Ib.*

USURY.

1. Where the defendant in a case of usury offered to swear to the circumstances of usury, and for that purpose made a statement of the facts he would swear to, and the plaintiff makes himself a witness under the act, it is not enough that he denies generally the truth of the statement made by the defendant, he must submit to be examined by the defendant in answer to the facts stated by him.—*Murden vs. Clifford*, 65

2. The Court thought the best practice would be to require the defendant to make his statement in writing and then to examine the plaintiff in answer to the statement. *Ib.*
3. A defendant who has pleaded usury to a demand against him, cannot take out a commission to have himself examined, as a witness under the act, on his going out of the State. He must appear in Court and give evidence.—*Stone vs. Jones*, 254
4. The maker of a Promissory Note, against whom a judgment has been recovered, is a competent witness at common law in a suit by the same plaintiff, the lender against the indorser to prove usury.—*Keckley vs. Cheer*, 397
5. The lender can only be a witness under the act, where the usury is offered to be proved by the evidence of the borrower, and where the borrower is not a competent witness at the common law. *Ib.*
6. Though a third person sue upon a contract said to be usurious, and the defendant offers to swear to the usury, the lender, though no party to the suit, may under the act, be examined to deny the usury.—*Harick vs. Jones*, 402
7. Notes originally founded on a good consideration, though afterwards sold for less than they are nominally worth, do not make a case of usury; but if originally discounted for less than their nominal amounts, it is usury. *Ib.*

WAY, RIGHT OF.

See Servitude.

WAGERS.

See Gaming.

WILL.

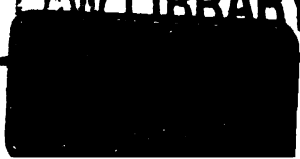
1. An instrument having the formality of a deed, may operate as a will, being voluntary and to take effect at the death of the maker.—*Singleton vs. Bremar*, 12
2. An executor, party to an issue of devisavit vel non, though he takes nothing by the will, cannot be examined as a witness in the cause.—*Vinyard vs. Brown*, 24
3. The testator in 1823, made his will of personal property, which was properly executed according to the laws at that time. By an act of 1824, three witnesses were required to wills of personal property, and the testator died in 1825, leaving no other will. The will having but two witnesses is void.—*In matter of Elcock's Will*, 35
4. A will as to personal property is considered as having existence only from the death, and not from the time of its execution; and it must be executed according to the requisites of the law at that time. *Ib.*
5. The executor of an executor does not represent the first testator unless probate has been taken out on the will of the testator by the first executor. Where the will was proved per testes, and a decision by the ordinary in favor of the will, but the granting of letters of administration suspended by an appeal from the ordinary, and in the mean time the executor dies, his executor does not repre-

- sent the first testator. To constitute probate letters testamentary must be granted on the will.—*In matter of Drayton's Will*, 46
6. "I give unto my wife H. B. my two negro female slaves, Sally and Harriet. I also give her one third part of my income annually during her life, to revert after her decease to my estate." Testator then gives to his son Thomas and to his heirs one third of his income. He then gives his daughter the remaining third of his income, for her sole benefit during life, and then to descend to her heirs lawfully begotten. The will then proceeds: "After the decease of my wife, the above named H. B., the whole of my estate to be equally divided between my son Thomas and my daughter Ann, and their heirs lawfully begotten. Held that the wife took an absolute estate in the two slaves.—*Blewer vs. Brightman*," 60
7. Testator in the first clause of his will, devised his mansion house and the lands attached to it to his wife during her widowhood; in the 8th clause he gives his grand-son the same premises, with an additional quantity of land, in fee simple. Held that the latter clause was not inconsistent and did not revoke the former, but that the grandson took a fee subject to the use during widowhood to the wife.—*Petters vs. Petters*, 151
8. Eccentricity, however great, is not sufficient to invalidate a will. *Ib.*
9. The mind is presumed to be sound until the contrary is clearly proved.—*Lee vs. Lee*, 183
10. Nor is it sufficient to shew that the imagination of the testator was generally disturbed with a strange belief in witches, devils and evil spirits, which he fancied continually worried him, and that he lived in the strangest manner, wearing an extraordinary dress, sleeping in a hollow log, and exhibiting other extravagancies, the man being able in other respects to manage his affairs. *Ib.*
11. To avoid a will for insanity, a case of general insanity must be made out, or particular insanity at the time of executing it. *Ib.*
12. It is not every man of a frantic appearance and behaviour who is to be considered as a lunatic. *Ib.*
13. If general insanity is proved, he that sets up the instrument must shew a lucid interval. *Ib.*
14. That a will is unjust to one's relations, is no legal reason that it should be considered as an irrational act. *Ib.*
15. The law puts no restrictions upon a man's right to dispose of his property, in any way his partialities, or pride, or caprice may prompt him. *Ib.*
16. The number, intelligence, and character of the witnesses on a question of insanity, should have great weight with the Jury. *Ib.*
17. The executor derives his authority over the goods of the testator from the grant of the ordinary, but not so with regard to lands devised, or a power to sell lands; these the devisee takes directly under the will, from the testator.—*Crosland vs. Murdock*, 217

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